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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 63

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, PRESIDENT, ET AL., PETITIONERS,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, ET AL.

No. 64

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, ET AL., ETC., PETITIONERS,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1946.

CERTIORARI GRANTED APRIL 22, 1946.

TRANSCRIPT OF RECORD

In the
United States Circuit Court of Appeals
For the Seventh Circuit

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, PRESIDENT AND F. H. NEMITZ, SENIOR VICE-PRESIDENT; AND BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, PRESIDENT AND S. R. HARVEY, ASSISTANT PRESIDENT,

Plaintiffs-Appellants,

No. 8714. *vs.*

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES AND J. M. FOX,

Defendants-Appellees.

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, AND FRED LEWIS, INDIVIDUALLY, AND AS MEMBERS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD,

Defendants-Appellants,

No. 8715. *vs.*

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES AND J. M. FOX,

Defendants-Appellees.

U. S. C. C. A. - 7
FILED
MAY 7 - 1945
CLERK

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED NOV. 13, 1944.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, PRESIDENT AND F. H. NEMITZ, SENIOR VICE-PRESIDENT; AND BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, PRESIDENT AND S. R. HARVEY, ASSISTANT PRESIDENT,

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Defendants-Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, PRESIDENT AND F. H. NEMITZ, SENIOR VICE-PRESIDENT; AND BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, PRESIDENT AND S. R. HARVEY, ASSISTANT PRESIDENT,

Petitioners,

8714 *vs.*

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES AND J. M. FOX,

Respondents.

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, AND FRED LEWIS, INDIVIDUALLY, AND AS MEMBERS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD,

Petitioners,

8715 *vs.*

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES AND J. M. FOX,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of July (it being the 3rd day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Four and of the Independence of the United States of America the 168th year.

Present:

Hon. John P. Barnes, District Judge,
Hon. Philip L. Sullivan, District Judge,
Hon. Michael L. Igoe, District Judge,
Hon. William J. Campbell, District Judge,
Hon. Walter J. LaBuy, District Judge,
Hon. Elwyn R. Shaw, District Judge,
Hon. William H. Holly, District Judge.
Roy H. Johnson, Clerk.
William H. McDonnell, Marshal.

Thursday, July 20, 1944.

Court met pursuant to adjournment.

Present: Hon. William H. Holly, Trial Judge.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

The Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President, *vs.* E. W. Fowler, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis,	Civil Action No. 3788.

COMPLAINT.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Petition for Declaratory Judgment in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the twelfth day of January, A. D. 1942:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—3788) * *

PETITION FOR DECLARATORY JUDGMENT.

The Plaintiffs, The Order Of Railway Conductors Of America, a voluntary unincorporated association, by H. W. Fraser, President, and F. H. Nemitz, Senior Vice President, and Brotherhood Of Railroad Trainmen, a voluntary unincorporated association, by A. F. Whitney, President, and S. R. Harvey, Assistant President, represent unto the court that this Petition for a Declaratory Judgment and the other relief, is filed on behalf of the members of the

said plaintiff's railroad labor organizations against the National Railroad Adjustment Board, First Division, and thereupon allege:

4 1. Plaintiff, Order Of Railway Conductors Of America, a voluntary unincorporated association, is a standard railroad labor organization, national in scope, with its chief executive offices located in the City of Cedar Rapids, State of Iowa; H. W. Fraser is the duly elected, qualified and acting President of said organization, and F. H. Nemitz is the duly elected, qualified and acting Senior Vice President of said plaintiff organization.

Plaintiff, Brotherhood Of Railroad Trainmen, a voluntary unincorporated association, is a standard labor organization, national in scope, with its chief executive offices located in the City of Cleveland, State of Ohio; A. F. Whitney is the duly elected, qualified and acting President of said organization, and S. R. Harvey is the duly elected, qualified and acting Assistant President of said plaintiff organization.

The plaintiffs bring this action on behalf of and as representative of all of the members of said organizations and in behalf of all other persons who may elect to associate themselves with the plaintiffs, as well as in behalf of all others who may be similarly situated, whether members of said plaintiff organizations or not.

2. Defendants are members of the First Division of the National Railroad Adjustment Board, an administrative or quasi-judicial Board created by the Railway Labor Act, as amended June 21, 1934, (c. 691, 48 Stat. 1185, 45 U. S. C. Secs. 151-163); and particularly Section 3 of

5 said Act of June 21, 1934; the First Division is a Division of said Board created by and organized under sub-section (h) of said Section 3, and maintains its headquarters and conducts its meetings and sessions in the City of Chicago, State of Illinois, in accordance with the provisions of said Act of Congress.

The membership of the said First Division consists of ten members, five of whom are selected and designated by the carriers and five of whom are selected and designated by the railroad labor organizations, national in scope, of the employees; that said First Division has jurisdiction over disputes involving train and yard-service employees of carriers, that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen and yard-service employees.

Defendants are and at all of the times mentioned herein were, the duly appointed, qualified and acting members of said National Railroad Adjustment Board, First Division, and individually and collectively hold said offices under and by virtue of the Act of the Congress aforesaid; and as members of said Division the defendants maintain headquarters and conduct hearings, hold meetings and sessions in said City of Chicago, State of Illinois, as required by said Act of Congress. Said defendants at all times herein mentioned and herein referred to, are and have been the regular or permanent members of said National Railroad Adjustment Board, First Division, duly appointed and qualified under and pursuant to sub-section (h) of said Section 3 of the Railway Labor Act.

6 3 This is a suit of a civil nature which arises under the Constitution and laws of the United States, under the Act of Congress of May 20, 1926, as amended June 21, 1934, (c. 691, 48 Stat. 1185, 45 U. S. C. Secs. 151-163) and commonly referred to as the Railway Labor Act, and the laws of the United States relating to interstate commerce, and is instituted pursuant to the provisions of the said Railway Labor Act and the laws of the United States relating to interstate commerce, and also under Judicial Act Section 274d(1), 28 U. S. C. A. Section 400(1), and also under the general equity jurisdiction of this court, by reason whereof this court has jurisdiction of this suit.

4. Heretofore, and on the 11th day of October, 1938, there was referred to the said National Railroad Adjustment Board, First Division, by petition of employees or groups of employees of the Great Northern Railway Company, a corporation, represented by the Order of Railway Conductors of America, plaintiff herein, a certain dispute and claim of V. E. Benjamin and M. L. Nagle, Yardmasters, otherwise known as yard-service employees, growing out of alleged grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, which dispute was docketed October 24, 1938, as No. 6404 in the official records of the said First Division of the National Railroad Adjustment Board. Attached hereto, marked Exhibit "A" and made by this reference a part hereof, is a copy of the ex-parte sub-

7 mission filed on behalf of said yardmasters in said dispute by said plaintiff organization. Said dispute prior to being referred as aforesaid by petition of employees or groups of employees represented by the plain-

tiff herein to the National Railroad Adjustment Board, First Division, had been handled in the usual manner up to and including the chief operating officer of the Great Northern Railway Company designated to handle such disputes and such handling had been completed and nothing on the date of reference to the said First Division remained or at any time since has remained or now remains to be done in order to complete such handling in the usual manner up to and including such chief operating officer, all as contemplated and provided by sub-section (i) of said Section 3 of the Railway Labor Act.

That on the 21st day of October, 1938, the Great Northern Railway Company, in Docket No. 6404 of the said First Division, filed its ex-parte submission wherein was protested the acceptance, hearing of or rendition of any Award in said dispute by the said First Division on the ground that the jurisdiction over the said dispute was in the Fourth Division of the said National Railroad Adjustment Board, whereupon the carrier members of the said First Division, defendants herein, declined and have ever since refused to set said dispute as contained in said docket for hearing.

5. Heretofore, and on the 4th day of January, 1941, there was referred to the said National Railroad Ad-
8 justment Board, First Division, by petition of the employees or groups of employees of the Southern Pacific Company (Pacific Lines), a corporation, represented by the Brotherhood of Railroad Trainmen, a plaintiff herein, a certain dispute and claim of W. W. May, Assistant Yardmaster, otherwise known as a yard-service employee, growing out of alleged grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions, which dispute was docketed the 26th day of March, 1941, as No. 12295 in the official records of the said First Division of the National Railroad Adjustment Board. Attached hereto, marked Exhibit "B" and made by this reference a part hereof, is a copy of the ex-parte submission filed on behalf of said yardmaster in said dispute by said plaintiff organization. Said dispute, prior to being referred as aforesaid, by petition of employees or groups of employees represented by the plaintiff herein to the National Railroad Adjustment Board, First Division, had been handled in the usual manner up to and including the chief operating officer of the Southern Pacific Company (Pacific Lines) designated to handle such disputes and such handling had been completed and nothing

on the date of reference to said First Division remained or at any time since has remained or now remains to be done in order to complete such handling in the usual manner up to and including such chief operating officer, all as contemplated and provided by sub-section (i) of said Section 3 of the Railway Labor Act.

9 That on the 24th day of March, 1941, the Southern Pacific Company (Pacific Lines), in said Docket 12295 of the said First Division, filed its ex-parte submission wherein was protested the acceptance, hearing of or rendition of any Award in said dispute by the said First Division on the ground that jurisdiction over disputes between carriers and yardmasters was in the Fourth Division of the National Railroad Adjustment Board, whereupon the carrier members of the said First Division, defendants herein, declined and have ever since refused to set said dispute as contained in said Docket for a hearing.

6. That said Fourth Division of said National Railroad Adjustment Board created under Section 3, subdivision (h) of said Railway Labor Act is composed of six members, three of whom are selected by the carriers and three by maritime labor organizations, national in scope, of the employees. That said Fourth Division has jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water and all other employees of carriers over which jurisdiction is not given to the First, Second and Third Divisions of said National Railroad Adjustment Board.

That the labor members of said Fourth Division at the times mentioned herein were officers of the national maritime labor organizations and at no time executive members of any of the standard railroad labor organizations appointing officers thereof as labor members of the First, Second and Third Divisions of the National Railroad

10 Adjustment Board, as provided for in Section 3(h) of said Railway Labor Act.

7. That on or about August 28, 1941, the carrier members of the said First Division of the National Railroad Adjustment Board addressed to the labor members of said First Division a communication attached hereto, marked Exhibit "C" and made by this reference a part hereof, wherein said carrier members informed the said labor members that they would not participate in any consideration of the merits in Dockets 6404 and 12295 and related

dockets, and proposed to the said labor members that the aforesaid docket and related dockets be filed with the Fourth Division of the National Railroad Adjustment Board and that said Fourth Division hear, determine and enter an Award or Awards thereon; that the said carrier members of said First Division declined and still refuse to set said Docket 6404 and Docket 12295 for hearings and to enter Awards thereon.

That in and by said Exhibit "C" the carrier members of said First Division refer to a decree entered in this court, chancery No. 16031, wherein the Fourth Division of the National Railroad Adjustment Board was directed and commanded to take jurisdiction of three individual disputes of yardmasters and to render awards thereon. That the terms and provisions of said decree applied only to the individual disputes as set forth in petition for mandamus according to the allegations of fact set forth in said petition. That the provisions of said decree entered as aforesaid, did not apply to, nor was it directed against, the defendants herein or any other Division of said National Railroad Adjustment Board, nor did said decree enjoin any other Division of said National Railroad Adjustment Board from exercising the jurisdiction conferred on said respective Divisions by Section 3(h) of the Railway Labor Act.

The defendants herein, members of the First Division, have never regarded said decree as having any binding effect upon or control or command of or as a direction to the members of the First Division, or any binding effect upon or control or command of or a direction to any Referee selected by the National Mediation Board to sit with the said First Division as a member thereof in Awards rendered by the said First Division in disputes involving claims of yardmasters as yard-service employees.

8. That in Docket 5944, Award 3609, rendered March 6, 1939, a coppy of which is attached hereto and marked Exhibit "D", rendered by the First Division without a Referee sitting as a member thereof, claims of yardmasters, as set forth in the ex-parte submission, sustained the jurisdiction of the First Division to hear, determine and render Awards on said disputes.

That in Docket 6960, Award 4077, rendered August 24, 1939, a copy of which is attached hereto and marked Exhibit "E", the First Division, with Dexter M. Keezer, a Referee, sitting as a member thereof, sustained the juris-

diction of the First Division to hear, determine and render an Award in a dispute concerning claims of a yardmaster against the Southern Pacific Company (Pacific Lines).

12 That in Docket No. 6549, Award 4150, rendered September 15, 1939, a copy of which is attached hereto and marked Exhibit "F", the First Division, with Frank M. Swacker, a Referee, sitting as a member thereof, sustained the jurisidiction of the First Division to head, determine and render an Award in a dispute concerning claims of a yardmaster against the Northern Pacific Terminal Company of Oregon.

That in Docket No. 4504, Award 2712, rendered March 31, 1938, a copy of which is attached hereto marked Exhibit "G", the First Division, with Frank M. Swacker, a Referee, sitting as a member thereof, sustained the jurisdiction of the First Division to hear, determine and render an award in a dispute concerning claims of a yardmaster against the Denver and Rio Grande Western Railroad Company.

9. That the duties of yardmasters, employed exclusively by rail carriers, consist of directing the work of the several classes of employees employed in a rail carrier yard, including engine crews, foremen, conductors, helpers, brakemen, engineers and firemen, switchtenders, yard clerks, car inspectors and helpers, track maintenance forces, road train and engine crews in train movement to and from rail yard and hostlers and helpers in movement of light engines to and from said rail yard. That the duties of said yard-

13 masters are confined to the operation of rail carriers and are in direct cooperation and operation with the duties performed by rail carrier employees in train, engine and yard-service, over which the First Division of the National Railroad Adjustment Board has exclusive jurisdiction, as provided in Section 3(h) of the Railway Labor Act.

10. Plaintiff further alleges that the rendition of Award 5944, Docket 3609; Award 4077 in Docket 6960; Award 4150, Docket 6549 and Award 2712, Docket 4504, by the First Division, established the jurisdiction of said First Division to hear disputes involving yardmasters as yard-service employees and that no further remedies provided by the Railway Labor Act are available to the plaintiffs under said Act and that all the requirements of said Act have been met by said plaintiffs for the hearing of said disputes, set forth in Exhibit "C" and for the rendition of

Awards thereon and that plaintiffs have no adequate remedy at law as against the said acts of the First Division which have been and are being committed or against the said unlawful acts of the defendants which they believe and aver the First Division proposes to commit in the future.

That as to the relief hereinafter prayed for the defendants will suffer no injury whatsoever from the granting of the same but that the plaintiffs, and the members thereof, will suffer great and irreparable injury if said relief shall be refused.

That the National Mediation Board and the members thereof in appointing Referees to sit with the First
14 Division members thereof, in disputes involving yardmasters, caused to be definitely established in said First Division jurisdiction to hear, determine and render Awards involving disputes of yardmasters as yard-service employees and that said National Mediation Board and its members are unable to afford said plaintiffs and its members further protection or any additional relief, and that said plaintiffs have exhausted all further remedies provided by the Railway Labor Act.

11. That by reason of the conflicting claims between the carrier members and the labor members of the First Division of the National Railroad Adjustment Board, plaintiffs, as representative of a certain group of employees, namely, yardmasters and yard-service employees are unable to secure a hearing on the disputes as set forth in Exhibit "C" and plaintiffs and their members are accordingly being deprived of the rights, privileges and remedies guaranteed to the employees of carriers for the hearing of disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions before said First Division, as provided for in Section 3(h) of the Railway Labor Act.

Wherefore, plaintiffs demand that the court adjudge:

1. That the services performed by yardmasters are rendered in conjunction with and as necessary incidents to services performed by other yard-service employees of
15 carriers and have been so regarded by the First Division of the National Railroad Adjustment Board and by Referees selected by the National Mediation Board to sit with the First Division as members thereof.

2. That the First Division of the National Railroad Ad-

justment Board has exclusive jurisdiction of disputes involving yardmasters as yard-service employees within the terms and definitions contained in Section 3(h) of the Railway Labor Act.

3. That the First Division of the National Railroad Adjustment Board is not bound by the provisions of the decree entered by this court in chancery case No. 16031.

4. That the plaintiff may be given such other, further and general relief as may be proper in the premises.

V. Craven Shuttleworth,
1115 Merchants National Bank Building,
Cedar Rapids, Iowa,

W. H. Endle,
Brotherhood of Railroad Trainmen Building,
Cleveland, Ohio,

Everett L. Gordon,
100 West Monroe Street,
Chicago, Illinois,
Attorneys for Plaintiffs.

16 State of Iowa } ss.
County of Linn }

F. H. Nemitz, being first duly sworn according to law, deposes and says that he is one of the plaintiffs in the above entitled action; that he is the Senior Vice President of the plaintiff Order of Railway Conductors of America; that he is fully authorized to make this verification on behalf of said Order of Railway Conductors of America and does make the same on behalf of said plaintiff as well as on his own behalf; that he has read the above Complaint and knows the contents thereof; that he has personal knowledge of the facts and things set forth therein and that the allegations contained therein are true.

F. H. Nemitz.

Subscribed and sworn to before me by the said F. H. Nemitz, this 30th day of December, 1941.

S. M. Hoffner,
Notary Public in and for Linn County, Iowa.

(Seal)

17 EXHIBIT "A".

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

Order of Railway Conductors

vs.

Great Northern Railway Company

Ex Parte Submission

Employes' Statement of Claim:

Claim of Yardmasters V. E. Benjamin and M. L. Nagle for loss of earnings by reason of reduction of force at Kelly Lake, Minn., November 7, 1937.

Statement of Facts:

November 7, 1937, Carrier discontinued position of yardmaster at Kelly Lake, Minn., paying $288.20 per month. Yardmaster V. E. Benjamin, who occupied that position, thereupon exercised seniority to displace junior yardmaster M. L. Nagle at Superior, Wis., which position paid $278.20 per month. Yardmaster Nagle thereupon exercised seniority as a switch foreman, which position paid $7.58 per day.

Employes claim that position of yardmaster at Kelly Lake should not have been abolished, and claim difference in earnings of the position from which displaced and actual earnings upon position thereafter occupied.

Position of Employes:

Request is made that Yardmasters Benjamin and Nagle be paid for loss of earnings sustained as outlined in Statement of Facts until they are restored to their former or equal earnings.

Request is based on violation of Article 5 of the agreement between the Order of Railway Conductors, representing the yardmasters, and the Railway Officers, effective April 1, 1937, which reads as follows:

"No change in the title of yardmasters of any grade will be made for the purpose of changing the rate of pay."

During the heavy movement of iron ore throughout the summer of 1937, three shifts of yardmasters were maintained at Kelly Lake, until on or about October 25, 1937, at which time two of them were withdrawn, which is not disputed, as there was a substantial reduction in business at that time, which left little or no duties as yardmaster to be performed for the two yardmasters withdrawn. However, the withdrawal of Benjamin November 7 was not justified, as there was then and thereafter 8 hours' work as yardmaster in a spread of 9 hours, which service has since that time been performed by a clerk and others who hold no rights as yardmasters and who are not paid yardmaster rates of pay, which is in violation of Article V of the agreement herein quoted. During the period following November 7, there were 4 to 5 transfer crews operating in and out of Kelly Lake yard, all of whom performed switching and which required supervision of someone acting in the capacity of yardmaster, which supervision was performed by persons not holding seniority as yardmasters and not receiving yardmaster's rates of pay.

During the summer of 1938 there was employed at Kelly Lake, one chief and two assistant chief dispatchers and three trick dispatchers, one yard clerk and one yard switch crew—the latter in hours 10 A. M. to 6 P. M. The chief and assistant chief dispatchers, yard clerk, and switch foreman all took turns at doing the yardmaster's work.

Throughout the summer there were as high as nine transfer crews operating throughout the week; also No. 421 and return extra operated in and out of Kelly Lake daily except Saturday. There was also an average of four to five road crews operating in and out of that terminal, all of whom performed switching and there were no yardmasters whatever employed, and since the withdrawal of Yardmaster Benjamin November 7, 1937, including the ore season throughout the summer of 1938.

I am attaching hereto Exhibits "A" to "H", inclusive, which disclose that this controversy has been going on during 1933 and thereafter. Chairman J. P. Donovan, shown in the correspondence, was then Chairman of the Great Northern yardmasters (Company Union), who held an agreement with the Management.

With reference to Article VII, Paragraph "C" in Ex-

hibit "B" of the agreement then in effect, which reads as follows:

"No change in the title of yardmasters of any grade will be made for the purpose of reducing the rates of pay of positions unless there is a change in the extent of their duties or responsibilities."

Paragraph "C", Article II, as mentioned in Exhibit "H" of the agreement then in effect, reads:

"Where one or two shifts are employed, a one-hour meal period may be designated by the Management. Where there consecutive shifts are employed to cover a 24-hour period, no meal period will be designated."

The conditions complained of in the correspondence shown as Exhibits "A" to "H", inclusive, during the years 1933 and 1934, exist at the present time.

Article IV, Paragraph (b) of the Yardmasters' Current Agreement reads:

"Yardmasters will hold seniority in all yards in their own seniority district, allocated as follows:" (and seniority districts are listed following the rule quoted.)

The principle in this case is sustained in National Railroad Adjustment Board, First Division, Awards 2623, 2861 and 5259.

All data in support of employes' position in connection with these claims has been presented to the Carrier and is made a part of the particular question in dispute.

Oral hearing before the Board is desired.

Order of Railway Conductors,
A. E. Landis,
General Chairman.

October 18, 1938.

19 EXHIBIT "A". July 28, 1933

Mr. F. J. Gavin
General Manager
Great Northern Railway
Duluth, Minnesota

Dear Sir:

Your letter of July 24 regarding yardmasters' positions at Kelly Lake. We are very sorry that you cannot see the yardmasters' angle in this case, as we still feel that we are being discriminated against in the Kelly Lake case.

However, if you will grant us an interview and let us present our side of the case we are sure we will be given due consideration.

Yours truly,
(Signed) J. P. Donovan,
Chairman.

cc—W. S. Dunn

20 EXHIBIT "B". August 8, 1933

Mr. F. J. Gavin
General Manager, G. N. Ry.,
Duluth, Minnesota

Dear Sir:

Due to pressure brought by yardmasters pertaining to treatment we are receiving in the Kelly Lake controversy I am again asking you to consider this case.

Your letter under date of July 24 you say you cannot see what you would do with a yardmaster until it is necessary to put on some switch power. I will go back to March, 1918. V. E. Benjamin was sent to Kelly Lake to relieve a yardmaster and was retained at Kelly Lake as yardmaster the year around. A chief dispatcher was also retained year around, balance of forces from both offices laid off at expiration of ore season. This also included switch power. This arrangement was kept in effect for quite a few years, then it was found feasible to work trick dispatchers year around at Kelly Lake giving them main line from Swan River to Grand Forks in addition to the Range. The day yardmaster was still retained at Kelly Lake year around,

his hours being shifted to suit business during winter months.

At the beginning of ore season each year a night yardmaster and an assistant chief dispatcher went to work at about the same time. You say our contention is that the chief dispatcher and assistant chief dispatchers are doing yardmaster's work. We still claim that this work is being done by someone and it is being done by dispatchers from what we learn and know.

The duties of a yardmaster at Kelly Lake: Be on the job in the morning and evening when transfer crews are starting to work to see that they get their cabooses and empties and get out of yard without being delayed, the handling of the crew boards, cinder pits, rips, coal chute, marking up of time freights and transfers, handling merchandise, etc. The call boy has always been under the supervision of the yardmaster. He also informs transfer crews where to pull and has numerous other duties all confined to yard work. There isn't any question in our minds but what there is a move on by a certain element to absorb the yardmaster duties at Kelly Lake.

Two years ago last fall as soon as ore business ceased it was the intention to pull the yardmaster's position off, a position that had been retained, how long previous to 1918 I did not investigate. At that time I protested this move to you and you decided in our favor. You informed us at the time due to business conditions the move was for economy and still a clerk was retained at Kelly Lake during that winter for the first time.

21 Last fall this same argument came up and the yardmaster who had worked year around since 1918 was pulled off and this dispatcher's clerk was to be retained with his hours changed to that of the yardmaster. I protested this arrangement, if you remember, and the clerk was also pulled off, leaving the dispatchers handle work at Kelly Lake last winter. Knowing that business was very poor, and due to wire conditions between Grand Forks and Superior trick dispatchers had to be retained at Kelly Lake, we let this matter drop. Now that business has picked up we find that we are closed out entirely.

We are satisfied that you are, and more or less have to go along with recommendations you receive from your subordinate officers when force reductions or additions are required. At Kelly Lake with exception of yardmasters and a few minor clerks there is a full force of dispatchers, three

chief, three trick men and a relief man making seven men, also a chief dispatcher's clerk and not one yardmaster. Our contention is that a yardmaster could have fitted in, say, one yardmaster, one assistant chief, hours to suit business, until more are needed. There is, as you know, only a chief and an assistant chief at Superior. The chief dispatcher does not come under the hours of service laws and the assistant chief and yardmaster could be worked through a spread, if necessary to cover busiest part of day or night. Under this arrangement we are confident that business would not be hampered and I cannot see where a complaint could be registered from any group.

We claim a violation under Article VII, Paragraph C that duties and responsibilities of a yardmaster are still at Kelly Lake.

Yours truly,
(Signed) J. P. Donovan,
Chairman.

cc—W. S. Dunn

22 EXHIBIT "C".

Duluth, Minnesota
August 11, 1933

Mr. J. P. Donovan
Yardmaster
Superior, Wisconsin

Dear Sir:

Referring to your letter August 9.

Spent two days at Kelly Lake recently and after investigating the matter thoroughly cannot see why the Great Northern Railway Company should be required to place a yardmaster at Kelly Lake until there is something there for the yardmaster to do. For instance yesterday we ran five trains of ore and three of them moved via Gunn, the ore not going into Kelly Lake yard at all. Conditions have changed entirely on the range and when there is sufficient amount of yard work to justify a yardmaster you can depend on it that we will employ a yardmaster; that is to say, when the Railway Company feel it would be economical to have this supervision it will be put on.

Yours truly,
(Signed) F. J. Gavin,
General Manager G. N. Ry.

23 EXHIBIT "D".

September 18, 1933

Mr. J. C. Rankine
Asst. to Vice Pres.
Great Northern Ry.
St. Paul, Minnesota

Dear Sir:

Referring to our conversation your office, relative to the positions of yardmasters at Kelly Lake.

I am making this appeal after taking the matter up through proper channels.

Our contentions are that yardmasters are not being given due consideration in this controversy. There has been one yardmaster retained at Kelly Lake year around, how long before 1918 I did not investigate. And at the beginning of ore season each year, two additional yardmasters were put on when business warranted. The ore business in 1932 did not warrant more than one yardmaster it was claimed, and at the expiration of ore season that year, this yardmaster was pulled off, leaving the duties and responsibilities of a yardmaster in other hands. This arrangement is still in effect at Kelly Lake.

We hereby protest this arrangement, claiming a violation under Article VII paragraph C of Agreement between the Great Northern Railway Company and its yardmasters.

Yours truly,
(Signed) J. P. Donovan,
Chairman, G. N. Yardmasters.

24 EXHIBIT "E".

Copy

St. Paul, Minnesota
September 28, 1933

Mr. J. P. Donovan, Chairman
Great Northern Yardmasters Assn.
Superior, Wisconsin

Dear Sir:

Your letter of September 18 regarding Kelly Lake.

You have not done what I suggested to you in conference as necessary for consideration of this particular grievance. I asked you to specify just what yardmasters' duties or responsibilities had been assigned to other employes and to what employes.

Yours very truly,
(Signed) J. C. Rankine,
Asst. to Vice Pres.,
G. N. Ry.

25 EXHIBIT "F".

Copy

October 3, 1933

Mr. J. C. Rankine
Asst. to Vice Pres.
Great Northern Railway
St. Paul, Minnesota

Dear Sir:

Your letter Stpt. 28. The duties and responsibilities of yardmaster at Kelly Lake are and have been up to the time yardmaster was pulled off, as follows:

Supervise movements of all yard engines, transfers, time freights and locals in yard.

Make out lists for switching.

Keep track of preference ore and line trains up accordingly.

Weigh cars and check cars, no car checkers employed.

Handle train board which fluctuates very much and re-

quires all told one hour or one and one half hours each day in ore season.

Supervise call boys. Held responsible for any improper calling of crews.

Office duties, correspondence, etc.

Switch (PBX) board is in yard office and yardmaster is responsible for service.

As in all yard work, watch Repair Tracks for delayed cars. Also check delayed company material cars.

Order company coal and see placed right at chute.

Watch cinder pits.

Winter same work with the exception of no ore and less movements but yardmaster manifests trains and calls most of the crews.

A chief dispatcher's chief clerk is doing 95% of the work formerly done by the yardmaster. He works every day of the month using Sunday to catch up on a joint trackage statement. Week days his work is almost entirely confined to yardmasters duties which I have mentioned above. Also there is a manifest clerk and the third operator on at Kelly Lake this year. These two positions were not on last year. It is very apparent that jobs were juggled to eliminate a yardmaster.

The difference in the daily rate of this chief dispatcher's clerk and a yardmaster is so slight that it does not warrant the consolidation of a chief dispatcher's clerk and a yardmaster's duties which are far in excess of the duties performed by this clerk while working solely in dispatcher's office. Up to this spring this clerk never at any time performed yard clerk's duties, let alone yardmaster's duties.

If this move was made for economy and if consolidation of positions were necessary we claim in justice to yardmasters, that the dispatchers could have been given the work of this clerk which consists mainly of a joint trackage statement which is a monthly report and the mine report which consumes not over thirty minutes a day, reports requiring not over one and one half hours in the business part of the season.

Yours truly,

(Signed) J. P. Donovan,
Chairman.

cc.—W. S. Dunn.

26 EXHIBIT "G".

Copy

May 17, 1934

Mr. J. C. Rankine
Asst. to Vice Pres.
Great Northern Ry.
St. Paul, Minnesota

Dear Sir:

My letter under date of October 3, 1933 re yardmasters' position at Kelly Lake.

The practice of using a clerk to perform the duties of yardmaster at Kelly Lake is still in effect and we would appreciate a decision in this matter.

Yours truly,
(Signed) J. P. Donovan,
Chairman.

cc—W. S. Dunn.

27 EXHIBIT "H".

Copy

May 18, 1934

Mr. J. C. Rankine
Asst. to Vice Pres.
Great Northern Railway
St. Paul, Minnesota

Dear Sir:

Following are several cases in the yards where I recently visited, similar to the one at Kelly Lake.

At Williston a yardmaster working 7 AM to 4 PM, a clerk 4 PM to 1 AM, a yardmaster 10 PM to 7 AM. Switch engines working 24 hours daily. Note clerk handling yard from 4 PM to 10 PM, six hours.

At Minot a yardmaster working from 8 AM to 5 PM, a clerk works from 4 PM to midnight, a yardmaster working 9 PM to 6 AM. The clerk on 4 PM shift handles yard and switch engines from 5 PM to 9 PM and clerk handles yard and switch engine from 6 AM to 8 AM. From four to six engines working through the twenty-four hours.

Breckenridge, Willmar, Whitefish and Harve the same conditions as Minot and Williston.

I saw a bulletin at Minot for bids on a clerk's position at Breckenridge. This bulletin stated that applicant must be able to handle yard.

St. Cloud has one yardmaster working and he is called at times to come to yard after serving his nine hours. Also called to yard previous to his starting time, on different occasions and does not receive any compensation.

I informed you verbally of this condition some time ago and you promised to look into it and let me know as to your findings. You will note that in each case in yards where 24 hour supervision is required and switch engines are worked 24 hours a day a yardmaster has been pulled off, the two remaining yardmasters made to work thru a spread of 9 hours and a clerk to fill in the balance of time.

We are not asking for a thing that we are not entitled to but we do feel that where a clerk is performing the duties of a yardmaster a yardmaster should be retained. The Superintendents have taken advantage of paragraph (c) Article 11 of our schedule by pulling off a yardmaster and making the remaining two work thru a spread of 9 hours which means nothing more than working 9 hours as not in a single case has a yardmaster been given a designated meal period, this leaving him responsible for every minute of the 9 hours.

Another thing, the yardmasters were instructed to double up in order to take their vacations. We did not take exceptions in this matter due to the small volume of business in the past two or three years and we were more than willing to do our share. Others were not asked or made grant any concession and we are losing faith, due to the fact that we are not granted any consideration in our complaints.

(Signed) J. P. Donovan,
Chairman.

cc—W. S. Dunn.

28 To The Members Of The National Railroad Adjustment Board:

Rebuttal, Docket Case 6404

Order of Railway Conductors

vs.

Great Northern Railway

Claim Of Yardmasters V. E. Benjamin And M. L. Nagle.

In the position taken by the Carrier in its submission to the First Division of the Board it has said the case is not properly before the First Division, whereas employes do not concur in that opinion.

In the Railway Labor Act as amended and approved April 10, 1936, under head of First Division is listed, in part:

"Yard Service Employes"

whereas no such mention appears in list of cases coming under the jurisdiction of Division 4 of the Board.

On Page 13 of the agreement between the Carrier and the Order of Railway Conductors, representing yardmasters, appears, in part, under head of "Monthly Rates of Pay":

"Kelly Lake yardmasters $288.20
Night yardmasters ..... 278.20"

which is quite conclusive indication that it was the intention of the Carrier as well as the employes' representatives, when the agreement was made, that yardmasters would be employed at Kelly Lake instead of their duties being performed by other employes.

During the summer of 1937 the Carrier employed three yardmasters at Kelly Lake, but withdrew two of them October 25 and the remaining one November 7, 1937, and there has been no yardmaster employed thereafter to the present time, October 1, 1940, and during those years yard engines were employed. During the ore season of 1940, three shifts of yard engine service are being employed, and, taking into account the traffic handled during the various seasons of the year as shown in "Position of Employes", the dispensing with the services of yardmasters

is apparently a retaliation on the part of the Carrier to the employes' complaints and final appeal to the Board, and the work has, since the withdrawal of yardmasters in 1937, been handled by train dispatchers, a car clerk and other employes. During the ore seasons more tonnage has been handled in and out of Kelly Lake than any terminal on the Great Northern System, without the employ of a yardmaster, and the clasifying of the ore at Kelly Lake to provide the proper grades of ore in the various trains to meet the requirements of loading of the boats at Allouez docks renders necessary switching of the cars at Kelly Lake, which should be supervised by yardmasters instead of other employes.

There are at the present time 16 transfer crews handling empties each 24 hours from Kelly Lake and distributing to the mines and bringing the loads back into Kelly Lake for assemblage into proper trains for movement from there to Allouez Docks; and there are 14 crews hauling the ore from Kelly Lake to Allouez and returning the empties to Kelly Lake in the movement of an average of 10 trains of 180 loads each day.

During winter months, when one yardmaster had, prior to 1937, been employed, his assigned hours were 4 A.M. to 1 P.M. His usual routine of duty was to be at the office to meet 421 from Superior and direct the switching operations for 3 transfer crews, all of whom secured cars from Train 421, as well as cars from the yard, one of them running to Hibbing, one to Virginia and one to Grand Rapids, Minnesota. These crews usually return before yardmaster was off duty, at which time he directed the disposal of their trains as well as directed making up of Train 422 for movement to Superior, Wisconsin.

The necessity for the employment of yardmasters at Kelly Lake throughout the winter as well as the summer months will no doubt continue for some time indefinite, as it has in the past.

It will be noted from the exhibits attached to employes' ex parte submission that prior to 1933 yardmasters were employed throughout the entire year; in fact there is, during the winter, necessary work for a yardmaster, and during the summer months, when the ore is moving there is plenty of work for three shifts of yardmasters, if they are permitted to perform the duties usually classed as

yardmaster's work, instead of this service being performed by train dispatchers, clerks and other employes in violation of Article 5 of yardmasters' agreement as mentioned in the ex parte submission.

On page 4 of the Carrier's submission it states in part: "During a heavy ore season the yardmasters' positions are busy ones" etc. The facts are that since November 7, 1937, no yardmaster has been employed at Kelly Lake during any season of the year, although the usual heavy ore movement was carried on during the summer months of 1938, 1939, 1940 and 1941.

At the rate the ore has moved from Kelly Lake and vicinity during the past summer, it is conservatively estimated that twenty million net tons will be moved from the mines by the Great Northern Railroad during the shipping season of 1940, about 80 percent of which moves through Kelly Lake yard.

Please see N. R. A. B. Award 4582.

R. E. Landig,
General Chairman, Order of Railway Conductors.

EXHIBIT "B".

Parties to Dispute (Brotherhood of Railroad Trainmen
(Southern Pacific Company (Pacific Lines).

Statement of Claim:

Ex parte submission of the Brotherhood of Railroad Trainmen in claim of Assistant Yardmaster W. W. May, El Paso Terminal, Rio Grande Division, for two (2) rest days worked in month of December 1938.

Statement of Facts:

W. W. May, Pacific Lines yardman, El Paso Terminal, was assigned as Assistant Yardmaster at that point August 16, 1937, and worked continuously in that capacity until November 15, 1938, no time being taken off except rest days, at which time he took his annual vacation, November 15 to 29, inclusive. Assistant Yardmaster May worked the entire month of December 1938 without rest days.

Claim was made as indicated, which was declined.

Position of Committee:

Articles 3 and 9, Agreement between the Southern Pacific (Pacific Lines) and the Railroad Yardmasters of America, effective February 1, 1938, which agreement applies to Southern Pacific (Pacific Lines) Yardmasters in El Paso Terminal, read:

Article 3

(Rest Days)

"(a) Local Chairman and Superintendents will cooperate in systematizing assignments of yardmasters, where it can be done, in a manner that all yardmasters regularly assigned—including relief yardmasters regularly assigned—and working full month will be granted in following month approximately equal to one (1) rest day per week, without loss of pay.

Example.—Yardmaster working full month of April will be granted one (1) day off per week in May.

(b) If, in any month, yardmasters referred to in paragraph (a) are required to work on their rest days, they will receive additional compensation at pro rata for each day, or days, so worked, but not to exceed two (2) days in any one (1) month.

(c) Rest days will not be cumulative but must be taken each week.

(d) Yardmasters, including regularly assigned relief yardmasters, forced to lay off account of illness or personal business, or a combination of both, five (5) days per month, will not forfeit rest days due them in the following month."

31 Article 9

(Vacations)

"(a) All yardmasters, including regularly assigned relief yardmasters, will be granted fourteen (14) days vacation with pay each year. The fourteen (14) days will include rest days in month vacation is taken.

(b) The annual vacation herein provided for will be granted only to those who have held the position of yard-

master, including regularly assigned relief yardmaster, for a period of twelve (12) months or more.

(c) If, for any reason, a yardmaster, including regularly assigned relief yardmaster, cannot be relieved for his annual vacation, he will receive extra pay at pro rata rate for each vacation, or portion thereof, worked by him.

(d) In the application of this Article, yardmasters—including regularly assigned relief yardmasters—will cooperate in avoiding extra expense to the Company, so far as it is possible."

It will be noted that Mr. May's service as Assistant Yardmaster fully qualified him for two (2) days at pro rata rate for each day, under the provisions of the above quoted rules, to which the Carrier has taken no exception. However, the Carrier has attempted to raise the point that claimant, who is a Pacific Lines yardman, comes under the agreement between the Southern Pacific (Atlantic Lines) and Railroad Yardmasters of America.

Our Committee is unable to understand this attitude of the Carrier, inasmuch as the Railroad Yardmasters of America and Southern Pacific (Pacific Lines) have an agreement, made effective February 1, 1938, which is still in full force and effect and applies to Southern Pacific (Pacific Lines) Yardmasters in the El Paso Terminal.

Reference is also made to Award No. 4117, Division One, National Railroad Adjustment Board, sustaining Committee's position that Southern Pacific (Pacific Lines) Yardmasters in El Paso come under the Southern Pacific (Pacific Lines) Yardmasters' Agreement.

In view of the above quoted rules and Board Award, Committee respectfully requests your Honorable Board render a decision in favor of the claimant.

Conference was held with the Management July 9, 1940, therefore, the Carrier has been fully apprised of Committee's position as herein set forth.

Respectfully submitted,

Oral hearing requested.

(Signed) R. J. Brooks,
General Chairman, Brotherhood of Railroad Trainmen, Southern Pacific (Pacific Lines).

32 EXHIBIT "C"

File—(No Protest from Labor Members)

National Railroad Adjustment Board

First Division

Chicago, Illinois

August 28, 1941

Dockets 6404
10665
12101
12277
12278
12280
12294
12295
11801

Messrs. Fred W. Lewis
Wm. Bishop
Paul M. Carter
R. E. Edrington
F. J. Williams

Gentlemen:

On the 11th day of July, 1938, a final decree and injunction was entered by Honorable William H. Holly, Judge of the District Court of the Northern District of Illinois, Eastern Division, in the case entitled United States, ex rel, Railroad Yardmasters of America, R. V. Murphy, J. Besant, E. E. Wheeler, *vs.* National Railroad Adjustment Board, Fourth Division, C. W. Deal, Chairman, R. B. Parkhurst, Secretary, A. J. Hancock, R. A. Walton, Charles P. Neill, E. J. Hamner, S. J. Hogan, and E. Murrin, Chancery No. 16031. Said decree specifically enjoined and commanded that the Fourth Division of the National Railroad Adjustment Board and the members of that division individually take jurisdiction of, hear, determine and enter awards on the merits on three ex parte submissions or disputes of R. V. Murphy, J. Besant and E. S. Wheeler, employed as yardmasters. That decree provided in part:

"That yardmasters are not included in any of the classes of employees over whose disputes jurisdiction is by said act (Railway Labor Act, 45 U. S. C. A. Sec. 153) given to the First Second or Third Divisions respectively of said

National Railroad Adjustment Board, nor do either of said last mentioned divisions of said board have jurisdiction of disputes arising out of their employment in which yardmasters are involved."

There are now pending before the First Division of the National Railroad Adjustment Board the following submissions or disputes arising out of employment in which yardmasters are involved:

Docket No. 6404—Order of Railway Conductors *vs.* Great Northern Railway Company.

Docket No. 10665—Brotherhood of Railroad Trainmen *vs.* Southern Pacific Lines in Texas and Louisiana.

Dockets 12101
12277
12278
12280
12294
12295

Brotherhood of Railroad Trainmen
vs.
Southern Pacific Company
(Pacific Lines)

In view of the said final decree and injunction of July 11, 1938, the carrier members of the First Division hereby give notice that they will not agree to set the said cases for hearing; and since it appears that by the terms of the amended Railway Labor Act as construed by the District Court of the Northern District of Illinois, Eastern Division, jurisdiction over the subject matter of each of the aforecited dockets is vested in the Fourtth Division, we propose that these cases and similar disputes and submissions arising in the future be docketed with the Fourth Division of the National Railroad Adjustment Board, and that said Fourth Division hear, determine, and enter awards thereon.

There is also at present pending in the First Division Docket 11801—Trainmen *vs.* Minneapolis, St. Paul & Sault Ste. Marie Railway—involving the seniority dating of a yardmaster as such, and upon which hearing has been waived. Jurisdiction over the subject matter of this docket we also maintain is vested in the Fourth Division, and not the First Division. Consequently, we will not participate in any consideration of the merits, and propose that said docket also be filed with the Fourth Division, and that

said Fourth Division hear, determine, and enter an award thereon.

Yours very truly,
Sgd. T. K. Flaherty,
For the Carrier Members—
First Division.

Copies to:

Mr. T. S. McFarland, Secretary, First Division: To be attached to and made a part of the Division's master files on these nine dockets.

Mr. R. A. Walton, Chairman, Fourth Division.

Mr. E. J. Hamner, Vice Chairman, Fourth Division.

Mr. R. B. Parkhurst, Secretary, Fourth Division.

33 EXHIBIT "D"

34 EXHIBIT "D"

Award No. 3609
Docket No. 5994

National Railroad Adjustment Board

First Division

Parties to Dispute:

Brotherhood of Railroad Trainmen
The Baltimore and Ohio Railroad Company

Statement of Claim: Protest relative to the removal of names of extra yardmasters from the Yardmasters' Rosters at Lincoln Park and Salamanca, New York, and request that their names be restored to the roster and paid the difference in pay for each day they would have worked as yardmasters while their names were off the yardmasters' seniority lists.

Employes' Statement of Facts: The names of several yardmasters that have appeared on all previous rosters at Lincoln Park and East Salamanca were removed from the July 1, 1936 rosters.

Position of Employes: Prior to the issuance of the roster on or about JJuly 1, 1936, the Yardmasters' seniority

lists of Lincoln Park and East Salamanca Yards were as follows:

"The Baltimore and Ohio Railroad Company

Buffalo Division

Lincoln Park Yard

Roster of Yardmasters and Assistant Yardmasters

Name		A.Y.M.	Y.M.	G.Y.M.
M. E. Moynihan		3-16-18	7-16-20	6- 1-21
C. A. Evans		10- 4-22	4-16-23	
A. G. Watson	*	11-13-25	11- 9-26	
H. H. Warner	**	4-21-23		
T. F. Curry	**	2-21-27		
L. P. Flaherty	**	8-22-27		

* — Watson passed Warner as Yardmaster

** — Extra Assistant Yardmasters.

"The Baltimore and Ohio Railroad Company

Buffalo Division

East Salamanca Yard

Roster of Yardmasters and Assistant Yardmasters

Name		A.Y.M.	Y.M.	G.Y.M.
E. J. Spellman				1- 8-29
D. P. Mooney	*	5-21-04		
J. P. Creagh		7-10-17	8-18-18	
H. L. Campbell	*	11- 1-18	4-23-23	
W. P. Connelly	*	4-16-19		
H. A. Bliss	*	5- 1-20		
W. J. Driscoll	*	2- 5-25		

* — Extra Assistant Yardmaster."

On or about July 1, 1936, the names of H. H. Warner, T. F. Curry and L. P. Flaherty were removed from the Lincoln Park Yardmasters' list, and the names of D. P. Mooney, H. L. Campbell, W. P. Connelly, H. A. Bliss and W. J. Driscoll were removed from the East Salamanca Yardmasters' list, as shown by the following:

"Seniority List of Yardmasters

Buffalo Division

Yardmaster		Present Position
Punxsutawney		
R. G. Tate	1- 1-1907	Gen. Y. M. Punxsutawney
B. J. Craft	9-18-1909	Y. M. 3:00 P. M.—11:00 P. M.
T. J. Kane	10- 3-1923	" 11:00 P. M.— 7:00 A. M.
Buffalo		
G. E. Lanagan	11-10-1920	Y. M. 7:00 A. M.— 3:00 P. M.
E. J. Spellman	7-17-1922	Gen. Y. M. E. Salamanca 1-8-1929
B. M. Watterson	11- 8-1928	Y. M. 3:00 P. M.—11:00 P. M.
M. R. Burns	1- 8-1929	" 11:00 P. M.— 7:00 A. M.
East Salamanca		
J. P. Creagh	8-18-1918	Yardmaster Second Trick
Lincoln Park		
M. E. Moynihan	7-16-1920	Gen. Y. M. Lincoln Park, N. Y.
C. E. Evans	4-16-1923	Y. M.—Brooks Ave. 3:00 P. M.—11:00 P. M.
A. G. Watson	11- 9-1926	Y. M.—Brooks Ave. " 11:00 P. M.— 7:00 A. M.
Clarion Junction		
J. H. Webb	8-13-1918	Clerk—Position Abolished."

You will see that these men have been shown on the several seniority lists from the time that their date is shown above, and during that period of time they have performed Yardmasters' service, both as regular and extra yardmasters, and established seniority as yardmasters during such period of time as provided in Rules 12 and 13, found on page 64 of the Trainmen's Agreement in effect on the Buffalo Division (former B. R. & P.), reading as follows:

"12. Yardmen promoted to official positions will retain their seniority.

"13. In the appointment of assistant yardmasters, the senior qualified yardmen shall be considered."

Therefore, the Committee contends that the Carrier cannot arbitrarily deprive these yardmasters of the seniority they have established, and which has been recognized by the Carrier over a period of years. Such seniority as yardmasters should continue in this class until voluntarily relinquished or until they are disqualified.

Oral hearing is desired.

Carrier's Statement: The above protest and claim quoted from the submission made by General Chairman Qualters in this case, refers to the removal of the names of extra yardmasters from the Yardmasters' Seniority Roster at Lincoln Park and East Salamanca and is not specific as to the names of the extra yardmasters that have been removed nor the amount of time such extra yardmasters are claiming as the result of their names having been removed from the Yardmasters' Seniority Roster. The Carrier is of the opinion that the Board should require the representatives of the Trainmen's Organization to set forth more definitely and comprehensively the particulars in this general complaint.

Our records show that the complaint of removing the names of extra yardmasters at Lincoln Park was submitted by the Local Chairman of the Trainmen's Committee to the Superintendent and in conference December 22, 1936, between Local Chairman L. P. Flaherty, representing the Brotherhood of Railroad Trainmen, and the Superintendent. A memorandum of conference was prepared containing the following joint statement of facts:

"The names of H. H. Warner, T. F. Curry and L. P. Flaherty were omitted from the only 1936 issue of seniority roster for Yardmasters at Lincoln Park, N. Y."

The same complaint was made by the Local Chairman in regard to the removal of names of extra yardmasters from the Yardmasters' Roster at East Salamanca. This complaint was submitted ex parte by the Local Chairman but no names were mentioned as having been improperly removed from the Yardmasters' Seniority Roster.

The investigation in connection with this complaint discloses the following facts:

1st—There is an agreement between the management of the former B. R. & P. Ry. Co. and the representatives of the Railroad Yardmasters of America governing rates of pay, rules and working conditions of yardmasters and as-

sistant yardmasters effective April 16, 1923. When the Baltimore and Ohio Railroad Company acquired the property of the B. R. & P. Ry Co., January 1, 1932, this agreement was accepted by the Company and is still in full force and effect.

2nd—After the effective date of this agreement a number of yard employes holding seniority rights under the Trainmen's Agreement, were promoted to the positions of Yardmaster and Assistant Yardmaster in the various yards on that property. Their names were placed on the Yardmasters' Seniority Roster with a seniority standing from the date of their appointment to such positions.

3rd—As result of reduction and changes in the yardmaster forces from time to time, the employes involved in this dispute were returned to yard service in the exercise of their seniority rights under the Trainmen's Agreement. However, after their return to yard service their names were still erroneously carried on the Yardmasters' Roster from year to year up to 1936, although at that time none of the employes in question were filling positions coming within the scope of the Yardmasters' Agreement and many of them had not filled such positions for several years.

When the Yardmasters' Roster for the year 1936 was being prepared, the question arose in regard to continuing the names of these employes on the roster and attention was called to Rule 4 of the Yardmasters' Agreement, which provides:

"Seniority of Yardmasters will date from the time they are assigned to positions as Yardmasters and will continue while employed as Yardmasters except that Yardmasters promoted to official positions will retain their seniority. Seniority Districts will be limited to yard in which employed."

In view of the fast that this rule was being invoked by the representative of the Yardmasters' Organization and at its insistence, the management removed the names of all the employes in question in compliance therewith as they were not employed at that time as yardmasters, and the Yardmasters' Organization contended that the rule had not been properly applied in past years when employes ceased to be employed as yardmasters and should have been removed from the rosters at that time. This action provoked the present dispute and was handled in the regular manner up to the Assistant to Vice President with the

Trainmen's Organization and the request was declined. During the period this dispute was being handled with the Trainmen's Organization the General Chairman, representing the Yardmasters on the Buffalo Division, former B. R. & P. territory, where a separate agreement is in effect as before stated, and the General Chairman representing the other divisions of the Baltimore and Ohio System, were taking active part in this dispute and under date of April 27, 1937, wrote the undersigned a joint letter in regard to the proper interpretation and application of Article 4 (the rule quoted above involved in this dispute and applying on the former B. R. & P. territory) and a similar rule, Article 9-A of the Baltimore & Ohio Yardmasters' Agreement, from which letter we quote, in part, as follows:

"* * * It is our conclusion that Article 9-A of the Baltimore and Ohio Yardmasters' Agreement and Article 4 of the former B. R. & P. Yardmasters' Agreement, which, in substance, are practically the same, will be continued in effect and will be applied as they have been interpreted in the past, to wit, no seniority is acquired by any employe working extra as yardmaster, and seniority does not start until an employe is assigned to a regular position as yardmaster. The names of the employes who may have worked in the past or may work in the future as extra yardmasters, have no place on the yardmasters' Seniority Roster, as the present rules clearly provide that seniority as a yardmaster does not start until assigned to a regular position.

Will be glad if you will bring this matter to the attention of all concerned in the preparation of rosters for the current year as well as rosters in the future."

It appears to the Carrier that this case involves a jurisdictional dispute and the management is placed in the peculiar predicament of having to defend a case involving pay claims against an organization that does not hold the contract covering the work of yardmasters and assistant yardmasters, which work is covered by a bona fide contract with another National Labor Organization. The management has always taken the position that the duly accredited representatives of a Railroad Labor Organization have the right to contend for a construction and interpretation of their own agreement without consideration of any other Railroad Labor Organization not a party thereto, and regardless of any construction thereof by such other organization.

It is the judgment of the Carrier that the representatives of the Railroad Yardmasters of America, Buffalo Division, former B. R. & P. Ry. should be made a party to this dispute before the case is heard by this Honorable Board in order that the rights of all parties at interest may be fully heard and considered.

We are firmly convinced that the action of the Carrier in this case in removing the names in dispute from the Yardmasters' Seniority Roster was in strict compliance with Rule 4 of the Yardmasters' Agreement applying on the Buffalo Division, former B. R. & P. Ry., and we believe this Board will sustain the right of the Yardmasters' Organization to interpret and construe their own agreement without interference from any other organization.

Oral hearing is desired.

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjust. ent Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The evidence of record shows that each of complainant yardmen, viz:

H. A. Warner
T. P. Curry
L. P. Flaherty
D. P. Mooney
H. L. Campbell
W. P. Connelly
H. A. Bliss
W. J. Driscoll

had, prior to 1936, acquired a date as, "Extra Assistant Yardmaster" on the "Roster of Yardmasters and Assistant Yardmasters," and which all parties concerned recognized over a long term of years as entitling them (the said yardmen) to preferential employment, over their respective juniors on said roster and over other yardmen having no date thereon, on temporary or permanent vacancies in position of Assistant Yardmaster as evidenced by the fact

that they were so used with more or less frequency throughout the years their names and dates were carried on the said roster.

In these circumstances it is held that there was, by common consent of all parties concerned tantamount to agreement between them, a working condition established affecting the employment status and wages of the aforenamed complainant yardmen of which they could not rightfully be deprived antedating an agreement between the carrier and the accredited representatives of the Yardmaster and Assistant Yardmaster class, and which agreement or interpretation of agreement is said to have been adopted by these parties on or about July 1, 1936.

AWARD

Such seniority as acquired by the aforenamed complainant yardmen under Article IV of the Yardmasters' Agreement prior to July 1, 1936, shall be restored to them, but without accumulating additional seniority in the Yardmaster and/or Assistant Yardmaster class subsequent to July 1, 1936, unless and until the same may have been earned under Article IV appearing in "Memorandum of Understanding reached at conference held at DuBois, Pennsylvania, April 18th, 1923, between the Management of the Buffalo, Rochester and Pittsburgh Railway Company and the Buffalo, Rochester and Pittsburgh Yardmasters' Association" and interpretations thereof made or adopted by the parties thereto or their successors. Claim for difference in pay for each day subsequent to July 1, 1936, that the aforenamed complainant yardmen would have worked as assistant yardmaster had they been given the preferential consideration herein awarded, is sustained

National Railroad Adjustment Board,
By Order of First Division.
Attest: (Sgd.) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 6th day of March, 1939.

35 EXHIBIT "E".

Award No. 4077
Docket No. 6960

National Railroad Adjustment Board

First Division

The First Division consisted of the regular members and in addition Referee Dexter M. Keezer when award was rendered.

Parties To Dispute:

Brotherhood of Railroad Trainmen
Southern Pacific Company (Pacific Lines)

Statement of Claim: Claim of Yardman J. R. Chapman, Eugene Yard—Portland Division, for difference between rate of pay allowed him and rate applicable to position of General Yardmaster, September 11th, 1937, and subsequent dates.

Employes' Statement of Facts: On September 7th, 1937, circular No. 7, was posted on bulletin board in switch shanty at Eugene reading:

Southern Pacific Company
(Pacific Lines)
Circular No. 7

Portland, Sept. 7, 1937.

Mr. J. A. Copeland is appointed General Yardmaster at Eugene, vice W. S. Love, assigned to other duties.

Effective this date.

G. H. Kilborn,
Trainmaster.

Approved:
D. J. Russell,
Asst. Superintendent.

Mr. Copeland held no seniority in Eugene Yard.

Above quoted circular was first information that there was to be any vacancy for position of General Yardmaster at Eugene and bulletin was not posted, advertising this position.

Yardman J. R. Chapman made application to take General Yardmaster position vacated by W. S. Love in letter of September 11, 1937, reading:

Eugene Oregon,
September 11, 1937.

Mr. E. L. King,
Superintendent,
Portland, Oregon.

Dear Sir:

Please accept this letter as my application to take the General Yardmaster Position, Eugene Yard, that was recently vacated by Mr. W. S. Love and to which Mr. A. J. Copeland, holding his yard seniority in Portland Yard, has been appointed.

As no notice of Mr. Loves vacancy appeared on the bulletin I request this be effective as of the date of Mr. Copeland's appointment, which was September 7, 1937.

This in accordance with, Docket Case (B. R. T.) No. 1, YDM 192-39 of July 9, 1937, promotion rule adopted by Mr. A. J. Hancock, Asst. General Manager S. P. Co., and Mr. C. H. Smith, Vice President, B. R. T., and bearing the signatures of Mr. R. J. Brooks, General Chairman B. R. T., Mr. W. E. Jones, General Chairman, B. L. F. & E., and Mr. S. A. Boone, Vice President, B. L. F. & E.

Yours truly,
(Signed) J. R. Chapman,
Yardman, Eugene Yard.

Position of Committee: The Committee contends, Yardman Chapman is entitled to compensation as claimed under provisions Docket Case (B. R. T.) No. 1 of July 9, 1936, file YDM 192-39, copy of which is submitted as Committee's Exhibit.

The Board's particular attention is directed to sections (a) (b) and (c) of the exhibit, which are quoted below for ready reference.

"(a) The title 'yardmaster' will include General Yardmasters (except at large and important terminals), Assistant General Yardmasters, Yardmasters and Assistant Yardmasters.

(b) A seniority list, to be known as a 'protected list' will be prepared covering each yard, showing date of all yardmasters (except General Yardmasters at large and important terminals), as of October 26, 1934.

(b) A seniority list, to be known as a 'protected list' will be prepared covering each yard, showing date of all yardmasters (except General Yardmasters at large and important terminals), as of October 26, 1934.

(c) In filling positions of Yardmasters, men shown on protected seniority list of yardmasters as of October 26, 1934, will have priority rights to such positions in their seniority order.

Should seniority list become depleted or in case no applications are received from those on the protected seniority list for vacancies or new positions created, senior qualified yardmen in point of service will be used. As a prerequisite to such appointment it will be necessary for the applicant to have served at least one year as engine foreman in yard where promoted."

The Board's attention is further directed to page three of the Exhibit, which shows the "protected list" of yardmasters at Eugene in accordance with Section (b) of the Exhibit. The name of A. L. Harrington appears on this "protected list" of Yardmasters and at the time this list was made Mr. Harrington was General Yardmaster at Eugene, therefore, in accordance with provisions of Section (b) of Exhibit, Eugene was not classed as a large and important terminal and the position in question should have been filled in accordance with Section (c) of Exhibit.

The Board's attention is cited to fact that in September 1937, a jurisdiction vote was taken by U. S. Mediation Board for representation of Yardmasters on Southern Pacific (Pac. Lines). In this election the General Yardmaster at Eugene was permitted to vote, which further substantiates the Committee's contention that Eugene Yard is not included in Ex parte 72, I. C. C.

The Committee contends that Yardman Chapman, having in excess of one year service as engine foreman in Eugene Yard and being senior yardman making application for General Yardmaster position should have been assigned and your honorable Board is requested to so find and award.

Conference was held with the Carrier, November 28, 1938.

The Committee's representative desires to be present when this case is heard.

Carrier's Statement: Carrier's submission pursuant to notice served by the National Railroad Adjustment Board, First Division, in connection with ex parte submission of the Brotherhood of Railroad Trainmen, wherein the following claim is presented:

"Claim of Yardman J. R. Chapman, Eugene Yard-Portland Division, for difference between rate of pay allowed him and rate applicable to position of General Yardmaster, September 11, 1937, and subsequent dates."

The only basis for this claim, of which the carrier has knowledge is stated in Organization's communication February 25, 1938, that part reading:

"Inasmuch as Eugene Yard was not recognized by the National Mediation Board as coming under I. C. C. Ex Parte No. 72, which is borne out by the fact that General Yardmaster at Eugene was voted by the Mediator in recent pool for jurisdiction of yardmasters. This Committee therefore, takes the position Yardman Chapman is entitled to time as claimed and respectfully request adjustment be made accordingly."

The Mediation Board did not presume to decide the application of Ex Parte No. 72. The omission of General Yardmaster at Eugene was by agreement between the Railroad Yardmasters of America and the Carrier and is open for further discussion between the Carrier and Yardmasters' Organization any time an occasion for such discussion may arise.

Position of Carrier: When Yardmen's Agreement in effect between the Brotherhood of Railroad Trainmen and the Carrier was revised November 26, 1920, all reference to General Yardmasters, Assistant General Yardmasters and Yardmasters was eliminated from said Agreement, confining representation of yardmasters by B. R. T. to assistant yardmasters. Notwithstanding said Agreement was consummated and signed, shortly thereafter a movement was initiated by the B. R. T. in an endeavor to represent the above classes, which, as stated, had been eliminated in 1920. This endeavor culminated by the adoption of Conference Memorandum of October 26, 1934, reading:

"Conference Memorandum

In filling positions of General Yardmasters (except at large and important terminals), Assistant General Yardmasters, and Yardmasters, such appointments will be made in seniority order from Yardmen in the service at point needed, first consideration to be given Assistant Yardmasters, if any; second—Engine Foremen; third—Yardmen; with the understanding in all cases the man's ability to fill the position will also be considered in making such appointments. In case no qualified men available at point needed, a man from some other yard on the territory where yardmen's seniority extends, with proper ability, will be used.

(Sgd.) A. T. Mercier,
General Manager,
Southern Pacific Company,
(Pacific Lines).

(Sgd.) Wm. Bishop,
Vice-President, B. of R. T.
(Sgd.) R. J. Brooks,
General Chairman, B. of R. T.
(Sgd.) F. E. Lazenby,
Vice-General Chairman, B. of R. T.
(Sgd.) R. P. Standley,
General Secretary, B. of R. T.
San Francisco, Calif.,
October 26, 1934."

In the application of said Memorandum, Carrier held that vacancies and new positions of General Yardmasters (except at large and important terminals), Assistant General Yardmasters and Yardmasters, as they relate to each other, should be filled in their seniority order; in other words, General Yardmasters, Assistant General Yardmasters and Yardmasters were privileged to make application and fill vacanies and new positions of General Yardmasters, Assistant General Yardmasters and Yardmasters as they may occur, and when necessary to augment the number of yardmasters or in filling temporary vacancies, eligible yardmen would be considered in their seniority order for such promotion, beginning with Assistant Yardmasters. Organization contended that the Memorandum should be interpreted that senior yardman in service, making applica-

tion, should be assigned to position of General Yardmaster, Assistant General Yardmaster or Yardmaster, as new positions and vacancies occur. By this manner of handling all General Yardmasters, Assistant General Yardmasters and Yardmasters regularly assigned and working as such, and who had satisfactorily filled such positions over a period of years, would be restricted from further advancement in the service. Organization lost sight of the fact that first consideration should be given to Assistant Yardmasters, in other words, they lost sight of the fact that the line of promotion began with the group represented by the B. R. T., that is, Assistant Yardmasters, but did not extend or outline the manner in which yardmasters may be promoted as such promotion relates to each other. It is folly to contend that an assistant yardmaster or an engine foreman should be promoted to General Yardmaster over those already serving as General Yardmasters, Assistant General Yardmasters and Yardmasters. What is contemplated by the Memorandum is, that yardmen would in time advance to positions of General Yardmasters (except at large and important terminals), Assistant General Yardmasters and Yardmasters, and that such appointments would be made in seniority order from yardmen in the service, first consideration to be given Assistant Yardmasters.

With view of clarification on July 9, 1936, conference was held between Mr. C. H. Smith, Vice-President, B. R. T., Mr. R. J. Brooks, Gen. Chairman, B. R. T., Mr. S. A. Boone, Vice-Pres., B. L. F. & E., and Mr. W. E. Jones, Gen. Chairman, B. L. F. & E., representing Organizations, and Mr. A. J. Hancock, Assistant General Manager, representing Carrier, and following Interpretation of the Conference Memorandum of October 26, 1934, was agreed upon:

"(a) The title 'yardmaster' will include General Yardmasters (except at large and important terminals), Assistant General Yardmasters, Yardmasters and Assistant Yardmasters.

(b) A seniority list, to be known as a 'protected list' will be prepared covering each yard, showing date of all yardmasters (except General Yardmasters at large and important terminals), as of October 26, 1934.

(c) In filling positions of Yardmasters, men shown on protected seniority list of yardmasters as of October 26, 1934, will have priority rights to such position in their seniority order.

Should seniority list become depleted or in case no applications are received from those on the protected seniority list for vacancies or new positions created, senior qualified yardmen in point of service will be used. As a prerequisite to such appointment it will be necessary for the applicant to have served at least one year as engine foreman in yard where promoted.

(d) Should the senior yardman not be available account of leave of absence or on account of sickness or other bona fide reason, he will, on reporting for duty, within a period of five (5) days, decide whether he desires to fill the vacancy or new position created during his absence or forfeit his rights as provided in Section (f).

(e) Should ability of senior yardman be questioned or an assistant yardmaster demoted, he will be furnished reasons therefor, and in either case right of appeal and investigation under yardmen's agreement is conceded.

The right of any yardmaster to have the regularly constituted committee of the Brotherhood of Railroad Trainmen represent him in the handling of his grievance, under the recognized interpretation of the agreement governing, is conceded.

(f) Should senior yardman decline promotion to yardmaster or decline vacancy as yardmaster, he will do so in writing, showing date of same. In each case he will forfeit his rights as yardmaster for a period of six months. At the expiration of six months from date shown in notice, he will be offered new positions and permanent vacancies occurring thereafter but will not be privileged to displace a junior man holding position as yardmaster, either regular or extra; neither will he be used to fill temporary vacancies.

(g) Should yardman who relinquished his right accept promotion to new position or permanent vacancy after expiration of six months and later job is discontinued, or he is displaced by senior man, he will be privileged to make displacement as outlined in Section (h).

(h) When the number of yardmasters is reduced, those losing their positions will be privileged to within five days (or if on leave of absence account sickness or otherwise, within five days from date of return) displace a junior yardmaster; if no junior yardmaster, then they may displace any yardman their junior.

(i) A yardmaster whose name appears on yardmasters' protected seniority list as of October 26, 1934, who of his own accord relinquishes his position as yardmaster in

writing and accepts other service not coming within the classification of yardmasters as set forth in Section (a), will forfeit his seniority on the protected list, except in case of bona fide sickness or injury; in such case yardmaster may relinquish his position as yardmaster and accept a position as yardman for a period of time without forfeiting his priority seniority. Local Chairman, B. R. T., will be advised from time to time, on request, what the latest physical condition of the individual is, and right of appeal against further extension of request involved, is conceded.

(j) Yardmasters regularly assigned will have the right to exercise their seniority on new positions and on vacancies of fifteen (15) days or more."

For ready reference protected seniority list, Portland Division, as of October 26, 1934, is shown:

"Portland Division

Name	Yardmaster Seniority	Yard Seniority
Brooklyn:		
W. C. Ward	8/ 9/10	10/27/86
R. W. Jackson	1/13/13	7/15/09
W. E. Christianson	4/ 6/17	4/29/01
R. W. Fitzsimmons	9/ 1/21	9/ 3/12
T. V. Odekirk	12/ 1/22	6/ 4/20
D. T. Smith	6/13/23	4/13/20
W. E. Palmer	9/ 8/26	8/ 1/11
C. J. Wheeler	5/15/34	4/12/20
Eugene:		
A. L. Harrington	6/18/22	5/ 6/20
A. J. O'Northam	5/31/24	6/ 2/23
W. S. Love	6/27/24	10/ 9/17
Salem:		
J. G. Koenig	4/ 1/23	
Albany:		
I. A. Hurst	7/ 1/23	4/19/16"

It will be noted that the above Interpretation sustains the Carrier's interpretation of the October 26, 1934 Conference Memorandum in that it restricts yardmen from exercising seniority over yardmasters assigned as such as of Octo-

ber 26, 1934, and that said yardmasters were given priority rights to such positions in their seniority order, but nothing in said Interpretation implies or contemplates that the Brotherhood of Railroad Trainmen represents or legislates for yardmasters, except the continuance of their right to represent assistant yardmasters. This analysis is emphasized by second paragraph of Section (e) of the Interpretation, reading:

"The right of any yardmaster to have the regularly constituted committee of the Brotherhood of Railroad Trainmen represent him in the handling of his grievance, under the recognized interpretation of the agreement governing, is conceded."

In further explanation, the purpose and intent of the Interpretation was to clear up misunderstandings growing out of Conference Memorandum of October 26, 1934, and to establish a uniform mode of procedure in the promotion of yardmen to positions of yardmasters, advancing from that point in conformity with Yardmasters' Agreement.

As previously stated, assistant yardmasters were the only yardmasters represented by the B. R. T. since 1920, which representation terminated with an election held by the National Mediation Board as set forth in Certification by that Board under date of September 17, 1937.

Between the time the Conference Memorandum was agreed to (Oct. 26, 1934) and the Interpretation thereof (July 9, 1936), Yardmasters on Southern Pacific, Pacific Lines, had voted in favor of representation by the Railroad Yardmasters of America, and on December 10, 1934, Mr. Thos. Goodwin, who had been elected General Chairman of that Organization, advised carrier that in accordance with vote taken the Railroad Yardmasters of America had been elected to represent General Yardmasters, Assistant General Yardmasters and Yardmasters, submitting record of vote taken by his Organization. On canvassing signatures submitted by Mr. Goodwin and his Committee, it was found that vote had been legally conducted and that Organization authorized under the Railway Labor Act to represent the aforesaid General Yardmasters, Assistant General Yardmasters and Yardmasters, and on December 26, 1934, Committee of the Railroad Yardmasters of America was notified that signatures presented had been identified and with one or two exceptions were found to be correct, and 2:00 P. M. Friday, Jany. 4, 1935,

was set for negotiations, which continued until April 2, 1935, when agreement was entered into and signed by representatives of the Railroad Yardmasters of America and Carrier, covering General Yardmasters, Assistant General Yardmasters and Yardmasters, and, in consonance with I. C. C. Ex Parte 72, Section (b), Article 10 was adopted, reading:

"Day General Yardmaster Oakland, San Francisco, Los Angels, San Joe, Brooklyn, Eugene, Sacramento, Roseville, Tucson, Fresno and Bakersfield, are excluded from this Agreement." (Emphasis supplied.)

It will be noted claim of Yardman J. R. Chapman did not develop until September 11, 1937, or 2 years and 5 months subsequent to Yardmasters' Agreement of April 2, 1935, containing Section (b), Article 10, above quoted. If there was no other supporting testimony, this alone would be sufficient to support the Carrier's contention that there is no merit in position taken by the Brotherhood of Railroad Trainmen in this case.

On September 17, 1937, carrier received advice from National Mediation Board, reading:

"National Mediation Board

(letterhead)

Washington, September 17, 1937

Mr. J. H. Dyer, Vice-Pres.,
Southern Pacific Co. (Pacific Lines) Case No. R-367
San Francisco, Calif.

Dear Mr. Dyer:

By direction of the Board, I am enclosing Certification in the matter of representation of yardmasters and assistants, employes of the Southern Pacific Company (Pacific Lines).

Very truly yours,
(Sgd.) George A. Cook,
Secretary."

Certification follows:

"National Mediation Board

Washington

In the matter of	)	Case No. R-367
Representation of Employes	)	Certification
of the	)	
Southern Pacific Company (Pacific Lines)	)	Sept. 17, 1937
Yardmasters and Assistants	)	

The services of the National Mediation Board were invoked by the Railroad Yardmasters of America to settle a dispute as to who may properly represent general yardmasters (except those coming under provisions of Ex Parte 72 of the I. C. C.), assistant general yardmasters, assistant yardmasters, yardmasters and relief yardmasters, employes of the Southern Pacific Company (Pacific Lines), as provided by Section 2, Ninth, of the Railway Labor Act, as amended.

The Board assigned Mediator William F. Mitchell, Jr., to investigate the dispute, after finding that a dispute existed among the employes in question the Board directed him to take a secret ballot to determine the choice of the employes.

Following are the results of the election as reported by the mediator and attested to by representatives of the contesting organizations who acted as observers:

Number of employes voting for contesting organizations:

	For Railroad Yardmasters of America	For Brotherhood of Railroad Trainmen	Void Ballots	No. of employes eligible to vote
Yardmasters and Assistants	113	75	7	224

On the basis of the investigation and report of election the National Mediation Board hereby certifies that the Railroad Yardmasters of America has been duly designated and authorized to represent general yardmasters (except those coming under provisions of Ex Parte 72 of the I. C.

C.), assistant general yardmasters, assistant yardmasters, yardmasters and relief yardmasters for the purposes of the Railway Labor Act.

By order of the National Mediation Board,

(Sgd.) George A. Cook,
Secretary."

It will be noted that the yardmasters were included in this Certification.

On September 29, 1937, General Chairman, Mr. Thos. Goodwin, Southern Pacific System, Pacific Lines, Railroad Yardmasters of America wrote Carrier as follows:

"This is to advise you the required thirty (30) days notice is hereby given you for the purpose of adding new articles to our present agreement, and the proper interpretation of other articles, also to add other articles pertaining to the rates of pay, rules and working conditions affecting Assistant Yardmasters and relief yardmasters."

to which carrier made reply on October 4, 1937, reading:

"This will serve to acknowledge your letter September 29th, 1937, reading:

'This is to advise you the required thirty (30) days notice is hereby given you for the purpose of adding new articles to our present agreement, and the proper interpretation of other articles, also to add other articles pertaining to the rates of pay, rules and working conditions affecting assistant yardmasters and relief yardmasters.'

Will appreciate it if you will let me have draft of the proposals you have in mind."

On October 16, 1937, Mr. Goodwin wrote, stating:

"Enclosed herewith is draft of new agreement which the Railroad Yardmasters of America wish to make with the Southern Pacific Co. (Pacific System). There may be a few more minor additions or changes, as well as the rates of pay that can be settled in conference with you.

The General Committee of the Railroad Yardmasters of America are anxious to meet with you at your earliest convenience regarding proposed Agreement."

Negotiations commenced shortly thereafter and continued through intermittently until January 17, 1938, when Agreement was consummated, taking effect February 1, 1938. In this Agreement, Section (b), Article 10, was continued verbatim, and for ready reference is quoted:

"Day General Yardmaster, Oakland, San Francisco, Los Angeles, San Jose, Brooklyn, Eugene, Sacramento, Rose-

ville, Tucson, Fresno and Bakersfield, are excluded from this Agreement." (Emphasis supplied.)

It will be noted the position of General Yardmaster, Eugene, was excluded from representation in both of the aforesaid agreements, (1st, the Agreement of April 2, 1935, and 2nd, the Agreement of Jany. 17, 1938) between the Railroad Yardmasters of America and the carrier; hence, carrier is privileged to select the person it considers most competent to fill the position of General Yardmaster at that point. In this connection, Eugene terminal covers a very large territory, being the terminus of the Siskiyou Line, Cascade Line, Coos Bay Line, Eugene-Portland Line, Springfield-Brownsville Branch and Wendling Branch. It is the first point where our supply of empties from the West must be segregated and switched and distributed to the various arteries leading therefrom. It is a widely scattered yard, covering considerable territory, and in reality is a more important one—because of the physical characteristics—than Brooklyn-Portland.

Mr. Chapman, while having qualified as assistant yardmaster Oct. 23, 1935, yet at no time has he filled a regular assignment as assistant yardmaster, notwithstanding on certain occasions he worked in that capacity. We have no record of when, if ever, he worked as Yardmaster, Assistant General Yardmaster or General Yardmaster, and on seniority list standing ahead of Chapman are shown the names of Assistant Yardmasters Porter, Ware, Mayers, Ryan and Boykin. It is quite evident, from the standpoint of experience, Mr. Chapman was not qualified to fill the position of General Yardmaster at Eugene.

In summing up case:

(1) It is clearly proven that the Brotherhood of Railroad Trainmen has not represented yardmasters on Southern Pacific Lines, since November 26, 1920, the exception to this is, that assistant yardmasters were represented by that Organization until Sept. 17, 1937, when the National Mediation Board certified that the Railroad Yardmasters of America had been duly designated and authorized to represent General Yardmasters (except those coming under provisions of Ex Parte 72 of the I. C. C.), Assistant General Yardmasters, Assistant Yardmasters, Yardmasters and relief yardmasters for the purposes of the Railway Labor Act.

(2) The Railroad Yardmasters of America, having

been duly authorized under the Railway Labor Act to legislate for yardmasters on Southern Pacific (Pacific Lines), beginning April 2, 1935, is and has been the sole bargaining agent for General Yardmasters (except those coming under provisions of Ex Parte 72 of the I. C. C.), Assistant General Yardmasters and Yardmasters, and subsequent to the Certification of September 17, 1937, also for Assistant Yardmasters.

(3) Eugene being considered a large and important terminal, in conference with the Railroad Yardmasters of America it was agreed position of General Yardmaster at Eugene would be omitted from Agreement and that the carrier was privileged to select a General Yardmaster if necessary from some other point on the Division, as was done in this case; however, the Railroad Yardmasters of America did not surrender their right to open negotiations at any time in the future concerning the inclusion of this position in their agreement, and subject remains dormant.

(4) It would be unprecedented and at variance with the Labor Act to concede that the Brotherhood of Railroad Trainmen has the right to legislate for positions of General Yardmasters which have been—by Agreement with the Railroad Yardmasters of America and in accordance with I. C. C. Ex Parte 72—omitted as set forth in Section (b), Article 10 of their Agreement. It is imperative that if these men are to be represented, as contemplated by the B. R. T., such representation belong to the Railroad Yardmasters of America, which Organization holds all rights and privileges provided by the Railway Labor Act with respect to representation of Yardmasters employed on Southern Pacific, Pacific Lines, and, as before stated, this subject remains dormant and is subject to a re-opening at any time either by the Carrier or the Railroad Yardmasters of America. In fact, some 6 months subsequent to signing Agreement, in negotiations with representatives of the Yardmasters' Organization, General Yardmaster at Bakersfield and General Yardmaster at Tucson have been included in Yardmasters' Agreement. Should the Brotherhood of Railroad Trainmen be sustained and given the right to legislate for General Yardmaster at Eugene, by the same token they will assume the right to represent all other General Yardmasters omitted under Article 10, Section (b), Yardmasters' Agreement, i.e., Oakland, San Francisco, Los Angeles, San Jose, Brooklyn, Sacramento, Roseville, and Fresno, thereby usurping the legal rights

guaranteed the Railroad Yardmasters of America under the Railway Labor Act, as well as nullifying Article 10, Section (b), Yardmasters' Agreement. In other words, the position assumed by the Brotherhood of Railroad Trainmen is in conflict with the rights and prerogatives of the Yardmasters' Organization and is in conflict with Agreement negotiated and now in effect between the Yardmasters' Organization and the carrier, also is in conflict with Section 2, Ninth, of the Railway Labor Act as amended, and Certification under said Act, September 17, 1937, by the National Mediation Board, authorizing the Railroad Yardmasters of America to represent General Yardmasters (except those coming under provisions of Ex Parte 72 of the I. C. C.), Assistant General Yardmasters, Assistant Yardmasters, Yardmasters and relief yardmasters for the purpose of the Railway Labor Act.

The facts and records herein submitted, we believe prove beyond any question of doubt that the carrier acted within its rights in selecting Mr. J. A. Copeland to fill the position of General Yardmaster at Eugene, also that the carrier was acting within its rights in denying claim of Mr. Chapman, September 11, 1937 and subsequent dates, and respectfully request your Honorable Board to so decide.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

Carrier requests the privilege of an oral hearing.

(Exhibits not reproduced.)

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The record in this case discloses that:

(1) In appointing Mr. J. A. Copeland as General Yardmaster at Eugene, Oregon on September 7, 1937, the carrier did not comply with its agreement of July 9, 1936, prescribing the method of filling positions of Yardmaster which provided that, except at large and important ter-

minals, such positions would be filled from a "protected list," or a roster of those having seniority at the yard in question.

(2) The carrier's violation of its agreement of July 9, 1936, was terminated on February 1, 1938, the effective date of an agreement between the carrier and the Railroad Yardmasters of America, an organization certified by the National Mediation Board on September 17, 1937, as duly authorized to represent yardmasters, because this agreement in Section (b) Article 10, specifically exempted the Day General Yardmaster at Eugene from the agreement, and thus exempted the carrier from restrictions in filling the position.

Award

Claim sustained and to be adjusted per Findings.

National Railroad Adjustment Board
By Order of First Division
Attest: (Sgd.) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 24th day of August, 1939.

36 EXHIBIT "F".

Award No. 4150
Docket No. 6549

NATIONAL RAILROAD ADJUSTMENT BOARD.

First Division.

The First Division consisted of the regular members and and in addition Referee Frank M. Swacker when award was rendered.

Parties to Dispute:

Brotherhood of Railroad Trainmen,
Northern Pacific Terminal Company of Oregon.

Statement Of Claim: Claim of C. E. Halbrook for the difference between what he earned as a switchman and what he would have earned as a yardmaster, period October 6, 1936, continuing until placed as yardmaster in accordance

with his date on the consolidated roster of switchmen and yardmasters.

Employes' Statement of Facts: C. E. Halbrook and F. H. Long date as yardmen as of August 20, 1920 and September 15, 1920, respectively. In September 1935 a vacancy occurred for a position as assistant yardmaster on the 11:00 P. M. shift and Halbrook orally declined to accept the job stating to the General Yardmaster that he elected to work as a switchman until he could hold a job as yardmaster on the first or second shift. Long accepted the job. Prior to that time neither of these men had ever held a regular job as yardmaster but both had taken their turn as relief yardmaster. On or about October 6, 1936, the position of assistant yardmaster on the 3:00 P. M. shift became vacant and both Halbrook and Long asked for it. Long was assigned. Since that time Halbrook has been used in his turn as relief yardmaster. Claim is that Halbrook is senior to Long as yardmaster, therefore should have been assigned to the 3:00 P. M. job in preference to Long.

Claim is based on rules, agreements, settlements and letters exchanged between the management and interested employes as copied below:

Yardmen's Agreement

Article 1—Terms of Agreement and Terminating Clause

Effective March 1, 1928, the following articles constitute in their entirety the agreement between the Northern Pacific Terminal Company of Oregon and its yardmen. This agreement supersedes all previous schedules and rules governing rates of pay and working conditions of yardmen and shall remain in effect until thirty (30) days' notice in writing shall have been given by either party of a desire to change or terminate the same or any part thereof.

It is understood and agreed that this agreement is superseded by and subordinate to any subsequent municipal, state or federal legislation.

Article 16—Promotion and Rights

(C) The seniority rights of yardmen will date from the time they enter the service in the yards or terminal where employed.

(D) The rights to preference of work and promotion will be governed by seniority in service, everything being

equal the yardman longest in service will be given the preference.

(E) In the appointment of yardmasters and assistant yardmasters the oldest qualified yardman will be given consideration.

Article 17—Seniority Lists

(A) Yardmen's seniority lists will be kept in yard office, open to inspection by yardmen.

The following letter constitutes a three-way agreement between the committee representing yardmen, a committee representing the yardmasters and the management of the Northern Paeific Terminal Company of Oregon and has never been canceled by agreement between the parties nor have the yardmen's committee ever been requested by the other parties to consider its cancellation:

The Northern Pacific Terminal Company
Of Oregon
Office of Manager

B. E. Palmer
Manager

Portland, Oregon, June 5, 1931
File E-14-1

Mr. A. J. Jack, Chairman
Brotherhood of Railroad Trainmen
Mr. J. B. Bell, Secretary
Mr. J. A. Kirkpatrick, Associate

Gentlemen:

The committee representing the Brotherhood of Railroad Trainmen on June 3, 1931, presented the following requests.

First. Yardmasters' seniority roster will be abolished.

Second. One seniority list will be in effect governing all yardmen, yardmasters, Assistant Yardmasters and Relief Yardmasters.

Third. In the appointment of Yardmasters or Assistant Yardmasters the oldest qualified yardman will be given preference.

Fourth. For relief work the oldest qualified available man on each shift shall be used.

Fifth. Men now working regular position as Yardmas-

ters or Assistant Yardmasters will not be disturbed by this agreement.

The Northern Pacific Terminal Company is now in agreement with the Brotherhood of Railroad Trainmen as to working conditions and rates of pay as applied to yard service. In that agreement the seniority rule reads:

1. The seniority rights of yardmen will date from the time they enter the service in the yard or terminal where employed.

2. In the appointment of Yardmasters and Assistant Yardmasters the oldest qualified Yardman will be given consideration.

3. Yardmen's seniority lists will be kept in yard office open to inspection by yardmen.

4. Chairman will be furnished copies of seniority list upon request.

Effective September 1, 1923, an agreement was made with the Yardmasters' Association covering working conditions and rates of pay of Yardmasters and Assistant Yardmasters of the Northern Pacific Terminal Company. The following clauses affect seniority and promotion under the Yardmasters Agreement:

1st. Scope. The term Yardmaster shall apply to Assistant General Yardmaster, Yardmasters and Assistant Yardmasters but will not apply to General Yardmasters or so-called foot board Yardmasters.

2nd. Promotion. Assistant General Yardmasters, Yardmasters and Assistant Yardmasters are subordinate officials and in making promotion, merit, fitness and ability will govern.

3rd. Retaining Seniority. Yardmasters when displaced as such on account of reduction of force or for other reasons, will be restored to the ranks from which promoted without loss of seniority where it does not conflict with existing agreements.

Under this agreement Yardmasters' seniority list has been compiled and posted. To comply with your request as to one seniority list will necessitate the joint agreement of the authorized representative of both the Brotherhood of Railroad Trainmen and the Yardmasters' Association. With this joint approval I am willing to approve the follow-

ing rules somewhat modified from your submission and with the understanding that the approval and acceptance in no way changes the general terms or understanding of the separate agreements:

First. One seniority roster will be maintained governing Yardmen, Yardmasters, Assistant Yardmasters and Relief Yardmasters.

Second. In the appointment of Yardmasters and Assistant Yardmasters, fitness and ability being sufficient the oldest qualified yardman will be given preference.

Third. For relief work the oldest qualified available man on each shift shall be used.

Fourth. Men now working regular positions as Yardmasters or Assistant Yardmaster will not be disturbed by this agreement.

Fifth. The Yardmen's seniority roster dated January 5, 1931, shall be considered permanent and not subject to question or change hereafter and it is understood as permanently fixing the dates of all names thereon.

If the above items one to five are acceptable to the regularly authorized representatives of both the Brotherhood of Railroad Trainmen and the Yardmasters' Association, they will be considered as an interpretation and application of the seniority rules and will not be considered as in any other way affecting the agreements above referred to.

An acceptance by the authorized representatives of this letter will be considered in full effect as of June 5, 1931.

Yours truly,

(Signed) B. E. Palmer,
Manager.

Accepted:

(Signed) A. J. Jack (General Chairman, B. R. T.)

(Signed) J. A. Kirkpatrick, (Committeeman, B. R. T.)

(Signed) J. B. Bell, (Committeeman, B. R. T.)

(Signed) Verdi Berg, (For Yardmasters' Association)

The following men were working regularly as yardmasters at the time the above agreement was made:

F. S. Gollings, J. A. Rannie, J. A. Humble, V. Berg, T. E. Furlong, Geo. Worden and Chas. Weston.

The following two letters relate to the above rules and understandings and are fully explanatory:

Portland, Oregon, July 3rd, 1933.

Mr. B. E. Palmer
General Manager, N. P. Terminal Co.
Portland, Oregon

Dear Sir:

There seems to be some misunderstanding or rather a difference of opinion as to an interpretation of seniority rule for Yardmasters in the Yardmasters agreement.

Would like to have an interpretation on the following, for instance, "A vacancy occurs on some trick, and the man eligible for the position from a point of seniority and fitness, etc., and has a date as Yardmaster, wishes to decline the position, account of sickness or other reasons."

Would he lose his date as Yardmaster, or would he retain his date and be eligible for the next vacancy?

Yours truly,
(Signed) V. Berg,
Chairman Yardmasters Ass'n.,
N. P. Terminal Co.

Portland, Oregon, July 6, 1933.

B. E. Palmer
Manager
Mr. Verdi Berg, Chairman
Yardmasters' Association
N. P. Terminal Company
Portland, Oregon

Dear Sir:

Your letter of July 3rd, 1933.

The yardmaster is not compelled to bid in or accept a new job or promotion. If the job is awarded to him by bid or assignment, on his request, he must accept. There would be no change in his seniority date on the list. Yardmasters should accept and protect the service when the job is offered, otherwise the question of fitness and ability might be raised against them in future jobs.

Yours truly,
(Signed) B. E. Palmer.

The following was the Agreement between the Yardmasters and the Company at the time the three-way Agreement between the Yardmen, the Yardmasters and the Management was entered into June 5, 1931, and was the Agreement in effect October 6, 1936, when this claim arose:

Agreement

(Effective Sept. 1, 1923)

Between the

The Northern Pacific Terminal Company of Oregon

and

The Yardmasters' Association Comprised of the Assistant General Yardmasters, Yardmasters and Assistant Yardmasters, Employes of the Northern Pacific Terminal Company.

Preamble

These principles are predicated upon the obligation of each Yardmaster to render honest, efficient and economical service to the railroads and to the public.

The spirit of cooperation between the management and the yardmasters being essential to efficient operation, both parties will so conduct themselves as to promote this spirit.

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1. Scope: The term "yardmaster" shall apply to Assistant general yardmasters, yardmasters and assistant yardmasters, but will not apply to General yardmasters or so-called footboard yardmasters.

2. Promotion: Assistant general yardmasters, yardmasters and assistant yardmasters are subordinate officials, and in making promotions, merit, fitness and ability will govern.

3. Vacations: Yardmasters who have been acting in that capacity continuously one (1) year or more will be allowed two weeks vacation each year with pay.

4. Rest Days: Yardmasters regularly assigned seven (7) days per week will be granted two (2) rest days per month without loss of pay, except for the month vacation

is given; these two (2) rest days off shall be arranged between the yardmasters and their superior officers.

5. Filling Temporary Vacancies: When a regularly assigned yardmaster is required to perform service other than regular duties, the rate of pay will not be less than his regular salary for days so used. When a yardmaster is required to substitute in a position paid a higher rate, he will assume the salary and the hours applicable to the position to which assigned.

6. Retaining Seniority: Yardmasters, when displaced as such on account of reduction in force, or for other reasons, will be restored to the ranks from which promoted without loss of seniority, where it does not conflict with existing agreements.

7. Assignments: Assignments for yardmasters and assistant yardmasters exclusive of an agreed upon meal period normally will be for eight (8) hours. Where the operating conditions fairly warrant assignments for nine (9), ten (10) or eleven (11) hours such assignments may be made. Monthly salaries set forth in the following rule for assistant general yardmasters are established for unassigned hours, and for yardmasters and assistant yardmasters are for assignment of eight (8) hours. The salaries for nine (9), ten (10) and eleven (11) hour assignments will be computed pro-rata for the hours assigned based on the salary provided herein applicable to the respective yard or point involved.

8. Monthly Salaries:

Assistant General Yardmaster	$310.00
Yardmasters	255.00
Asst. Yardmasters	230.00

9. Date Effective and Changes: The foregoing in its entirety constitutes an agreement between the Northern Pacific Terminal Company of Oregon and the Yardmasters' Association, of The Northern Pacific Terminal Company and will remain in effect one (1) year from effective date (September 1, 1923), and thereafter subject to thirty (30) days written notice, by either party to the the other of a desire to change or terminate the same or any part thereof.

For the Yardmasters' Association—The Northern Pacific Terminal Company
(Signed) V. Berg.

For the Northern Pacific Terminal Company of Oregon
(Signed) B. E. Palmer,
Manager.

The following is an agreement entered into between the yardmasters and the management December 18, 1937, and is still in effect:

Agreement

Between the

Northern Pacific Terminal Company of Oregon

And the

Railroad Yardmasters of America

Scope

Rule No. 1. This Agreement shall apply to the positions of Assistant General Yardmasters, Yardmasters, and Assistant Yardmasters in existence during the life of this Agreement. It is mutually agreed that the positions of General Yardmaster does not come within the scope of this Agreement, and are in no way affected by the terms of this Agreement.

Hours of Service

Rule No. 2. Eight consecutive hours, exclusive time transferring in going on or off shifts, shall constitute a day's work for Assistant General Yardmasters, Yardmasters, and Assistant Yardmasters.

Rates of Pay

Rule No. 3. The monthly rates of pay for eight hours' service per day for the calendar month shall be as follows:

Location Title	Monthly Salary
Portland Assistant General Yardmaster	$313.20
Portland Yardmaster	288.20
Portland Assistant Yardmaster	258.20

Calculation of Rates

Rule No. 4. Day's pay will be computed on basis of calendar day month. Less two days.

New Positions

Rule No. 5. Salaries of new positions shall be in conformity with salaries for positions of similar kind or class at the point established.

Temporary Vacancies

Rule No. 6. Assistant General Yardmasters, Yardmasters or Assistant Yardmasters taken from their assignments to perform temporary service in lower rated positions shall not have their rates reduced and when temporary or permanently assigned to higher rated positions they will receive the higher rates while occupying such positions.

Rest Days

Rule No. 7. Assistant General Yardmasters, Yardmasters and Assistant Yardmasters who are regularly assigned will be granted two (2) rest days per month without loss of pay, to be arranged between them and their superior officers.

Vacations

Rule No. 8. Assistant General Yardmasters, Yardmasters and Assistant Yardmasters who have been continuously in service one year or more in such positions will be allowed two (2) weeks' vacation with pay per annum.

Limitation of Work

Rule No. 9. Assistant General Yardmasters, Yardmasters, Assistant Yardmasters will not be required to bleed cars or couple up air where carmen are employed.

Seniority

Rule No. 10. Seniority of Assistant General Yardmasters, Yardmasters and Assistant Yardmasters shall date from date of regular assignment to such positions and will be restricted the terminal at which employed.

(b) Promotion will be based on fitness, ability and seniority. The management to be the judge.

(c) Fitness and ability being equal, the oldest yardmaster or assistant yardmaster in a point of senority will be given preference as to assignments.

(d) Assistant general yardmasters, yardmaster or assistant yardmasters promoted to official positions with the Terminal Company or granted leaves of absence in connection with committee work, will retain and accumulate seniority under this Agreement.

(e) Assistant general yardmasters, yardmasters or assistant yardmasters laid off in reduction in force will retain seniority and will be used for extra or relief work when available.

(f) A correct seniority list shall be maintained in the general yardmasters or manager's office, available to all employes covered by this Agreement.

Adjustment Procedure

Rule No. 11. Any Assistant General Yardmaster, Yardmaster or Assistant Yardmaster who feels he has been unjustly treated will: Provided written request is presented to his immediate superior within five (5) days of the date of advice of such alleged unjust treatment be accorded a hearing and the right to appeal to his superior officers up to and including the highest officer designated to hear such cases.

Date Effective and Changes

Rule No. 12. This Agreement shall be effective as of December 18, 1937, and shall continue in effect subject to thirty (30) days' notice from either party of desire to revise or terminate the same or any part thereof.

For the Railroad Yardmasters of America
By: (Signed) Sidney A. White
General Chairman
(Signed) Frank W. Long

For the Northern Pacific Company of Oregon
By: (Signed) H. D. Mudgett
Manager
Approved
(Signed) E. L. King

The following two letters constitute a submission and a settlement of a case involving a dispute as to the application of paragraph 3 of the three-way Agreement of June 5, 1931:

Portland, Oregon
January 24, 1935

File N. P. T.-1

Mr. B. E. Palmer, Manager
N. P. T. Co. of Oregon
Terminal Depot Bldg.
Portland, Oregon

Dear Sir:

Submitting claim of Yardman E. B. Estes for difference between time allowed as a switchman and time claimed as relief yardmaster on third trick from December 6, 1934, until the regular man returns or Mr. Estes is placed as relief yardmaster.

The decision of Yardmaster Humble as contained in his letter of December 8th to Mr. Estes is not satisfactory and the claim is appealed to you.

Statement of Facts: A three-way agreement was entered into by the committee representing switchmen, the chairman for the yardmasters and the management, the agreement being dated June 5, 1931, paragraph 1 to 5 inclusive thereof reading as follows:

"1. One seniority roster will be maintained governing yardmen, yardmasters, assistant yardmasters and relief yardmasters.

2. In the appointment of yardmasters and assistant yardmasters, fitness and ability being sufficient, the oldest qualified yardman will be given preference.

3. For relief work the oldest qualified available man on each shift shall be used.

4. Men now working regular positions as yardmasters or assistant yardmasters will not be disturbed by this agreement.

5. The yardmasters seniority roster dated January 5, 1931, shall be considered permanent and not subject to question or change hereafter and it is understood as permanently fixing the dates of all names thereon."

Mr. Estes, with the exception of about three months, did

all of the relief work on the third trick. On November 22, 1934, the regular yardmaster of this trick found it necessary to lay off and go to the hospital for an operation and Mr. Estes worked in his place from that date until the 27th inclusive, laid off for three days and then did the yardmaster's work until December 5th inclusive, at which time he was relieved by the regular assigned assistant yardmaster of the second trick; and this yardmaster was in turn relieved by an engine foreman of the first trick. Claim is for the difference in earnings on basis of the agreement above quoted.

Position of Committee: It is the contention of the committee that claim is sustained by the agreement and failure to handle as agreed entitles Mr. Estes to the difference in earnings.

Will be glad to discuss this claim with you at your early convenience.

Yours truly,
(Signed) C. W. Stevens,
General Chairman

The Northern Pacific Terminal Company
Of Oregon

Portland, Oregon
December 4, 1936

File E-4-2

Mr. C. W. Stevens, Gen. Chairman
Brotherhood of Railroad Trainmen
45 Rose Friend Apartments
Portland, Oregon

Dear Sir:

This is to advise that the claim of Yardman E. B. Estes for the difference between yardmaster's rate yardman's rate from December 5, 1934, to January 20, 1935, will be paid.

Yours truly,
(Signed) H. D. Mudgett,
Manager

cc: QRA
JAH

The employes desire to be represented at the hearing of this claim.

Position of the Employes: (1) The employes contend that the Agreement of June 5, 1931, between the yardmasters, yardmen and management, established one consolidated seniority roster of yardmen and yardmasters, except that according to its terms men working as yardmasters at that time thereafter retained a prior seniority right over all others as yardmaster; that subsequent to this agreement all yardmen have a right as yardmaster in accordance with their date as yardmen, subject only to the qualification provided for in Article 16 Section (E) of the Yardmen's Agreement and the admitted prior right of yardmasters working as such at the time the agreement was signed; that neither Mr. Long or Mr. Halbrook were working regularly as yardmaster June 5, 1931, therefore, Mr. Halbrook being senior to Mr. Long as a yardman is senior to him on the consolidated roster and, accordingly, is senior to him as a yardmaster; that subsequent to this agreement no yardman can properly secure a prior right as yardmaster over a senior yardman by bidding in a job as yardmaster, nor does a senior man failing to bid for and accept a position as yardmaster lose any yardmaster rights; that the question of competency is not herein involved, because Mr. Halbrook has proven he is qualified to act as yardmaster by services as such prior to October 6, 1936, and by service as yardmaster many times since then in compliance with the third provision of the agreement, and that failure to assign him as yardmaster on the 3:00 P. M. shift October 6, 1936, entitles him, under the principles of seniority, to the difference in earnings as claimed.

(2) The employes further contend that the Agreement of June 5, 1931, did not affect or change either the Yardmen's or Yardmasters' Agreements as then existing, but was merely supplementary thereto. The Yardmasters' Agreement of September 1, 1923, contained no seniority rules. The Agreement of June 5, 1931, duly signed by the committee representing the yardmasters, provided specific seniority rules, giving yardmasters, then working, a prior right over men their senior as yardmen and gave all other yardmen a right as yardmaster in accordance with their date as yardman. It will be noted that the yardmasters revised Agreement of December 18, 1937, is at variance in

some of its provisions with the Agreement of June 5, 1931. The committee representing yardmen received no notice of the contemplated change, as required by Article 1 of its Agreement with the carrier and as required by the Railroad Labor Act, therefore, we regard such provisions as a nullity insofar as they seek to modify the three-way agreement. Rules 10 (a), 10 (c), 10 (e) and 10 (f) are at variance with and are opposed to the requirements of the First, Second and Fifth sections of the Agreement of June 5, 1931; rule 10 (b), if intended to cover promotion from yardman to yardmaster, conflicts with both the three-way agreement and Article 16 (E) of the Yardmen's Agreement.

Mr. Berg's letter of July 3, 1933, and Mr. Palmer's reply of July 6, 1933, we think, shows conclusively that both the management and the representatives of the yardmasters fully understood that men holding yardmaster's right (the consolidated roster), may elect to work as a yardman without prejudice to his rights as a yardmaster.

The settlement in the Estes case December 4, 1936, as shown by letters copied herein, illustrates, we think, that while the management was inclined to dispute the meaning of the third section of the Agreement of June 5, 1931, they nevertheless conceded the validity of the rule when they paid the claim. The employes urge that if the third section of the Agreement is regarded as valid the other sections must likewise be regarded as valid and, furthermare, that the intention of the three parties was clearly set forth in Mr. Palmer's letter of June 5, 1931 in which he analyzed rules in both the yardmen's and the yardmasters' schedules and concluded that the Agreement asked for by the yardmen and by the yardmasters would necessarily require the joint concurrence of the two organizations and of the management, and it follows that when the Agreement was signed it became effective and the rights therein established cannot be arbitrarily set aside except by conference and agreement between the parties as provided for in the Railroad Labor Act.

Carrier's Statement of Facts: This is a claim by Mr. C. E. Halbrook that under the provisions of the Northern Pacific Terminal Company of Oregon's schedule for yardmen and interpretation thereof contained in letter agreement dated June 5, 1931, that he should have been appointed

to the second trick (3:00 P. M. to 11:00 P. M.), Assistant Yardmaster's position at Guild's Lake Yard in September, 1936.

Mr. Halbrook's claim is not based on the provisions of the agreement between the Northern Pacific Terminal Company of Oregon and the Yardmasters' Association. The First Division of the National Railroad Adjustment Board would not have jurisdiction to hear and decide a claim growing out of the interpretation and application of the Yardmasters' Agreement.

The Northern Pacific Terminal Company of Oregon performs freight, passenger and industry switching in the City of Portland, Oregon, serving the Northern Pacific, Southern Pacific, Union Pacific, S. P. & S. and Great Northern Railways. The yardmasters' force on the Terminal property consists of a General Yardmaster, an Assistant General Yardmaster, two Yardmasters and five Assistant Yardmasters. There are three main yards of the Terminal Company, namely; Union Station Yard, where passenger trains are handled; Depot Freight Yard which is in close proximity to the Union Station Yard; and Guild's Lake Yard, which is two miles from the Union Station Yard. Guild's Lake Yard is a freight classification yard. Roundhouse, storeroom, car repair and coach cleaning forces are located at Guild's Lake. In addition nine major industries are served in this yard.

Mr. Halbrook has a seniority date as yardman of August 20, 1920. Mr. F. W. Long has a seniority date as yardman of September 15, 1920. Mr. J. T. Beach has a seniority date as yardman of June 23, 1913.

In October, 1935, it was necessary to make an appointment of an Assistant Yardmaster on the third trick (11:00 P. M. to 7:00 A. M.), at the Depot Yard. This appointment was offered to Mr. E. C. Halbrook. The offer of this appointment to Mr. Halbrook was on the basis of his seniority as a yardman under the provisions of Rule 16 (e) of the Yardmen's Agreement. The position of third trick Assistant Yardmaster at the Depot Yard was at that time a comparatively light Assistant Yardmaster's job. General Yardmaster Humble told Mr. Halbrook that if he accepted the appointment he would be given assistance on the position. This assistance would be furnished by the General Yardmaster himself, and by the Yardmaster located at

the Union Station whose hours of duty were 11:00 P. M. to 7:00 A. M. The Union Station is located in close proximity to the Depot Yard and the peak passenger business is over at midnight.

Mr. Halbrook declined the appointment as Assistant Yardmaster in October, 1935. The appointment was then offered to Mr. F. W. Long who was junior to Mr. Halbrook as a yardman. Mr. Long accepted the appointment and was assigned third trick Assistant Yardmaster at the Depot Yard, which position he filled until his promotion to position of second trick Assistant Yardmaster at Lake Yard in September, 1936.

In September, 1936, position of Assistant General Yardmaster was created. Assistant Yardmaster E. W. Reece was promoted to this position. Mr. F. W. Long was promoted to the second trick Assistant Yardmaster's position at Lake Yard, and Mr. J. T. Beach, a yardman, was appointed as Assistant Yardmaster and assigned to Mr. Long's former position of third trick Assistant Yardmaster at the Depot Yard.

The only service that Mr. Halbrook performed as a yardmaster prior to September, 1936, consisted of twenty-seven days relief work between July, 1928, and March, 1929. Mr. Halbrook's seniority entitled him to work as a yard foreman on the second or third tricks, and had he performed such service he would have been in position to secure relief yardmaster's work on such tricks which would qualify him for appointment to an Assistant Yardmaster's position. However, he elected to work as a yard helper on the first trick instead of as a foreman on other tricks, and because of this he was not in line to perform relief yardmaster's work. Had Mr. Halbrook accepted the appointment to the Assistant Yardmaster's position in October, 1935, and continued to work as an Assistant Yardmaster he would have been in line in September, 1936, for promotion to the second trick Assistant Yardmaster's position at Guild's Lake Yard.

Rule 16 (e) of the Northern Pacific Terminal Company of Oregon's schedule for yardmen reads:

"In the appointment of yardmaster and assistant yardmasters, the oldest qualified yardman will be given consideration."

Carrier's Exhibit "A" is copy of agreement effective

September 1, 1923, between the Northern Pacific Terminal Company of Oregon and the Yardmasters' Association.

Carrier's Exhibit "B" is copy of letter of June 5, 1931, addressed to Messrs. A. J. Jack, J. B. Bell, J. A. Kirkpatrick, signed by Mr. B. E. Palmer, Manager of the Northern Pacific Terminal Company of Oregon, and accepted by Messrs. Jack, Kirkpatrick and Bell and also by Mr. Verdi Berg for the Yardmasters' Association.

Position of Carrier: There is no basis for Mr. Halbrook's claim under the provisions of Article 16 (e) of the Yardmen's Agreement or under the letter of June 5, 1931, as Mr. Long was not appointed as an Assistant Yardmaster in September, 1936. Mr. Long was promoted from one Assistant Yardmaster's position to another Assistant Yardmaster's position under the provisions of the Yardmasters' Agreement. Mr. Halbrook had acquired no rights under the Yardmasters' Agreement, and hence he would have no basis for a claim under that agreement because of the promotion of Mr. Long. This is recognized by Mr. Halbrook as his claim is based on the Yardmen's Agreement and interpretation thereof contained in letter of June 5, 1931, which deal with the appointment of yardmasters.

Mr. Halbrook was not a yardmaster at the time Mr. Long was promoted to the second trick Assistant Yardmaster's position at Lake Yard in September, 1936, as he had declined appointment to such a position the previous October. Mr. Long was a yardmaster at that time and had been a regular yardmaster since October, 1935. The promotion of Mr. Long was in conformity with the provisions of the Yardmasters' Agreement of September 1, 1923 (Carrier's Exhibit "A"), reading:

"2. Promotion: Assistant General Yardmasters, Yardmasters and Assistant Yardmasters are subordinate officials and in making promotions, merit, fitness and ability will govern."

Mr. Halbrook has no basis for claim because of the promotion of Mr. Long as Mr. Halbrook had not at that time been appointed to a yardmaster's position. If Mr. Halbrook has any basis for a claim because of the appointment of a yardmaster in September, 1936, it is because of the appointment of Mr. J. T. Beach which was the only appointment then made to a yardmaster's position. Mr. Beach is senior to Mr. Halbrook as a yardmaster, and, therefore,

under the provisions of the Yardmen's Agreement and under the letter of June 5, 1931 (Carrier's Exhibit "B"), Mr. Halbrook would have no basis for claim on the basis of seniority as a yardman because of the appointment of Mr. Beach. Had Mr. Long simply remained in his position as third trick Assistant Yardmaster, and a new appointment made to the second trick position in question, Mr. Beach and not Mr. Halbrook would have been appointed.

Article 16 (e) of the Yardmen's Agreement reads:

"In the appointment of yardmasters and assistant yardmasters, the oldest qualified yardman will be given consideration."

This rule applies when there is an appointment of a yardmaster or assistant yardmaster. Mr. Long was not appointed as an assistant yardmaster in September, 1936, but was simply promoted to a more favorable assistant yardmaster's position at that time after having been appointed to an assistant yardmaster's position in October, 1935. Therefore, Article 16 (e) of the Yardmen's Agreement would not sustain Mr. Halbrook's claim that he should have preference over Mr. Long because Article 16 (e) deals with appointments of yardmen to yardmasters' positions, and not with promotions of yardmasters.

The letter of June 5, 1931 (Carrier's Exhibit "B"), first recites five requests from the Brotherhood of Railroad Trainmen. The third request was for a change in Article 16 (e) of the Yardmen's Agreement by changing the last word from "consideration" to "preference." None of these requests dealt with changing the provisions of the promotion rule of the Yardmasters' Agreement.

The letter of June 5, 1931, next recites Article 16 (c) and (e) and Article 17 (a) and (b) of the Yardmen's Agreement. These are rules pertaining to seniority of yardmen.

The letter of June 5, 1931, then recites certain provisions of the Yardmasters' Agreement, viz. the scope rule, promotion rule and retaining seniority rule. After these recitations there are set out five specific things that were agreed to. Those that are here involved are:

"First: One seniority roster will be maintained governing yardmen, yardmaster, assistant yardmasters and relief yardmasters.

"Second: In the appointment of yardmasters and assistant yardmasters, fitness and ability being sufficient, the oldest qualified yardman will be given preference."

After the statement of what was agreed to be the following is said:

"If the above items one to five are acceptable to the regularly authorized representatives of both the Brotherhood of Railroad Trainmen and the Yardmasters' Association, they will be considered as an interpretation and application of the seniority rule and will not be considered as in any other way affecting the agreements above referred to.

"An acceptance by the authorized representatives of this letter will be considered in full effect as of June 5, 1931."

The letter was signed by Manager Palmer for the Terminal Company and accepted by Messrs. Jack, Kirkpatrick and Bell for the Brotherhood of Railroad Trainmen and by Mr. Berg for the Yardmasters' Association.

There is nothing contained in the letter of June 5, 1931, that changed the promotion rule of the Yardmasters' Agreement. To the contrary, it is perfectly clear from the letter of June 5, 1931, that that rule was not changed; the request presented by the Brotherhood of Railroad Trainmen and the specific things that were agreed to in the letter of June 5, 1931, did not include any change in the promotion rule of the Yardmasters' Agreement. The letter of June 5, 1931, specifically provided that there would be no change in the general terms of understandings of the separate agreements (Yardmen's and Yardmasters' Agreements), and that what was agreed to would be considered as an interpretation and application of the seniority rule, and not be considered as in any way affecting the agreements above referred to (Yardmen's and Yardmasters' Agreements). Therefore, as Mr. Long was promoted from one Assistant Yardmaster's position to another Assistant Yardmaster's position, this transaction was entirely within the terms of the Yardmasters' Agreement, which had not been changed by the letter of June 5, 1931. There would, therefore, be no basis for Mr. Halbrook's claim under the provisions of the Yardmasters' Agreement as Mr. Halbrook was not a yardmaster.

In the presentation of this claim Mr. Halbrook relies on that portion of what was agreed to in the letter of June 5, 1931, reading:

"First: One seniority roster will be maintained governing yardmen, yardmasters, assistant yardmasters and relief yardmasters."

If Mr. Halbrook is correct that by virtue of his seniority as a yardman he was entitled to the second trick Assistant Yardmaster's position in September, 1936, then there would have been no necessity for that provision of the letter of June 5, 1931, which related to appointments of yardmasters, as on Mr. Halbrook's theory a yardman already held rights as a yardmaster because of his yardman's seniority. Furthermore, if Mr. Halbrook is correct, then the provisions of the promotion rule of the Yardmasters' Agreement were set aside by the letter of June 5, 1931. Obviously, Mr. Halbrook cannot be right in his contention as the letter of June 5, 1931, recognized:

First: That the promotion rule of the Yardmasters' Agreement was not changed, and;

Secondly: That there would be appointments of yardmasters from yardmen on the basis of yardmen's seniority.

To arrive at the result which Mr. Halbrook is seeking it is necessary that the express provisions of the Yardmasters' Agreement, the Yardmen's Agreement, and the letter of June 5, 1931, be entirely disregarded.

If Mr. Halbrook has any basis for a claim because of the appointment of a yardmaster in September, 1936, it is because of the appointment of Mr. Beach, as the only yardmaster that was appointed in September, 1936, was Mr. Beach. Mr. Halbrook had not attempted to displace Mr. Long on the third trick Assistant Yardmaster's position, apparently recognizing that he would have no right to do so. Had Mr. Long remained on the third trick position, and had Mr. Beach been appointed as yardmaster and assigned to the second trick position in September, 1936, the only basis for a claim by Mr. Halbrook would have been because of the appointment of Mr. Beach. Mr. Halbrook had no more right in September, 1936, to displace Mr. Long on the second trick position than he would have had to have displaced him on the third trick position. Mr. Long was then a yardmaster and had been in that status since the previous October; Mr. Halbrook was in September, 1936, and during his entire service with the Terminal Company prior thereto, in the status of a yardman.

Mr. Halbrook's claim must be based on the premise that he could pass up a yardmaster's position at will and later when some desirable position was vacant or when it suited his fancy, displace a yardmaster who had previously been appointed to and continued to fill a yardmaster's position.

This certainly would not be fair to his fellow employes. If Mr. Halbrook is correct then other yardmen would have the same right and men who accept yardmasters' positions would be in continual jeopardy of being displaced from such positions. Such a condition was never contemplated by the Terminal Company. The Terminal Company is satisfied that neither the representatives of the employes who accepted the letter of June 5, 1931, nor the employes whom they represented, would have subscribed to anything that would have brought about such a condition.

Mr. Halbrook's claim cannot be sustained because:

1. Article 16 (e) of the Yardmen's Agreement and interpretation thereof contained in letter dated June 5, 1931, deals with the appointment of yardmen to yardmasters. Mr. Long was not appointed from a yardman's position to an assistant yardmaster's position in September, 1936. Therefore, as between Mr. Halbrook and Mr. Long it was not a case of preference of appointment from a yardman's to a yardmaster's position. Consequently, Article 16 (e) of the Yardmen's Agreement and interpretation thereof contained in letter dated June 5, 1931, does not sustain Mr. Halbrook's claim.

2. The promotion of yardmasters is governed by the Yardmasters' Agreement. The letter of June 5, 1931, did not change the promotion rule of the Yardmasters' Agreement. Until Mr. Halbrook established the status of a yardmaster he would have no basis for a claim under the Yardmasters' Agreement because of the promotion of men covered by that agreement.

3. The seniority provision of the letter of June 5, 1931, did not give yardmen any rights except when there was to be an appointment of a yardmaster. This was a preservation of the rights of yardmen under the Yardmen's schedule. If, as Mr. Halbrook contends, the seniority provisions of the letter of June 5, 1931, gave him rights which he could exercise over Mr. Long when the latter was promoted within the terms of the Yardmasters' Agreement, then the provisions of Article 16 (e) of the Yardmen's Agreement were superseded by that letter, the provisions of the Yardmasters' Agreement were set aside and the provisions of that letter about appointment of yardmasters is meaningless; no such intent or result can be read into the letter of June 5, 1931.

Oral hearing is desired.

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The transfer of Mr. Long from the third trick to the second trick was not a "promotion" his rank on each trick being the same i. e., assistant yardmaster. Accordingly under the terms of the three party agreement of June 5, 1931, Mr. Halbrook by virtue of his seniority was entitled to preference in appointment to fill vacancy. The claim however should be for the difference between amount earned and pay of assistant yardmaster rather than yardmaster and will be sustained to that extent.

Award

Claim sustained to extent indicated by Findings.

National Railroad Adjustment Board
by Order of First Division
Attest: (Sgd.) T. S. McFarland,
Secretary

Dated at Chicago, Illinois, this 15th day of September, 1939.

EXHIBIT "G".

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Award No. 2712
Docket No. 4504

NATIONAL RAILROAD ADJUSTMENT BOARD

First Division

The First Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

Parties to Dispute:

Brotherhood of Railroad Trainmen

The Denver and Rio Grande Western Railroad Company

Statement of Claim: Claim of F. L. Ellis, Assistant Yardmaster, Burnham, for time lost while out of service from September 21st, for his alleged responsibility in mishandling M. P. 77386, Autos consigned to Ford Motor Company. Article 16 (e) of the Yard Schedule.

Joint Statement of Facts: Following investigation held at Burnham September 19, 1936, to determine responsibility in connection with delay to M. P. 77386 autos consigned to Ford Motor Company, Assistant Yardmaster Saunders and Ellis were discharged from service of the Company and claimed pay for time lost. Claim for time while out of service was denied by the Management.

This claim is for $7.53 per day for each employe.

Oral hearing is desired in this case.

Position of Employes: Assistant Yardmaster S. J. Saunders working as Night Yardmaster was taken out of service September 17, 1936, and F. L. Ellis, Assistant Yardmaster, was taken out of service September 21st. Following investigation held September 19th, they received the following letter:

"This is to advise you that as result of formal investigation held at Burnham September 19th, in connection with delay to MP 77386, autos, consigned to the Ford Motor Company at Denver, you are discharged from the service

of this Company for your responsibility in mishandling this car."

There was no evidence developed at the investigation that consist of train First 66 with car of autos was delivered to the yard office at Burnham or Denver.

The evidence shows that Night Yardmaster Saunders was required to leave his work as Night Yardmaster and assist the Engine Foreman with his work in order to avoid delay to passenger trains Second 15, Nos. 1 and 16, as shown on pages 3 and 4 of the transcript.

The evidence further shows on page 6 that protest was previously made to the Chief Clerk and General Yardmaster in reference to calling Mr. Devore as an Engine Foreman.

The evidence shows on pages 6 and 7 that Assistant Yardmaster Ellis received no information there was a car of autos on train First 66.

There was a new operator at Burnham who was not familiar with the work and could not furnish the information that was furnished previous to the 17th, giving the numbers of cars and list on the phone of contents and for what line.

The evidence further shows on page 8 that in looking over the consists of different trains there was no consist of train First 66, and that he had a new man on the lead engine, and as shown on page 9, both of the main lines blocked.

The following taken from the report shows that:

"Yard conditions were admittedly bad in 7th Street Yard on the morning in question and the Foreman used on one of the engines was not sufficiently familiar with the work to handle his work properly. Also the operator on duty on third trick, Burnham, has worked this job for only a short time, and he also did not seem to click very well. However, even with these disabilities it was the responsibility of the Assistant Yardmaster as well as the Night Yardmaster to have informed themselves from the consist of First 66 or the switch list of this train, or to even have checked the carding if necessary to be in a position to carry out instructions on the handling of this business. Both of these employes admitted they did not know there was a car of autos for Ford Motor Company on First 66, and the car was worked through the terminal into the C&S transfer through the regular routine."

The foregoing shows the yard conditions were bad, the

help furnished was incompetent due to lack of experience, which is the responsibility of the Carrier and not of either Acting Night Yardmaster Saunders or Assistant Yardmaster Ellis.

Position of Carrier: As result of investigation held at Burnham (Denver) September 19, 1936, to determine responsibility in connection with delay to Missouri Pacific car 77386, loaded with automobiles and consigned to the Ford Motor Co., Denver, arriving on first 66 at 4:20 A. M. September 17th, Assistant Yardmaster S. J. Saunders, acting as night yardmaster, and Assistant Yardmaster F. L. Ellis were dismissed from the service.

The Carrier contends the facts developed at the investigation, transcript of which is attached hereto as supporting evidence, fully justified the permanent dismissal of Messrs. Saunders and Ellis, and holds that in view of the subsequent reinstatement of these employes on a leniency basis there is no justification under the rules for this particular claim.

Transcript of investigation held in the office of the Trainmaster, Burnham, 4:30 P. M., September 19, 1936, in connection with failure to handle MP 77386, autos, consigned to the Ford Motor Company, Denver, arriving Denver First 66 at 4:20 A. M., September 17th.

For the Company—

J. E. Kemp, Trainmaster
A. E. Rice, Master Mechanic

Principals and representatives—

S. J. Saunders, Asst. Yardmaster, represented by Mr. Oscar Fields, Switchman.
F. L. Ellis, Asst. Yardmaster, represented by Mr. L. B. Albaugh, Switchman.

Questions by Mr. Kemp:

Gentlemen: This investigation is being held to ascertain facts and determine responsibility in connection with delay in delivering to C&S of MP 77386, autos, consigned to the Ford Motor Company, Denver, arriving Denver First 66 at 4:20 A. M., September 17th. Principals in this investigation are Mr. S. J. Saunders, who was acting night yardmaster, and Mr. F. L. Ellis, assistant yardmaster.

Q. Mr. Saunders, did you receive notice to attend this investigation?

A. Yes, sir.
Q. Have you a representative?
A. Yes, Mr. Oscar Fields, switchman.
Q. Are you ready to proceed?
A. Yes, sir.
Q. Mr. Ellis, did you receive notice to attend this investigation?
A. Yes, sir.
Q. Have you a representative?
A. Yes, Mr. L. B. Albaugh, switchman.
Q. Are you ready to proceed?
A. Yes, sir.

Testimony of Mr. S. J. Saunders—Questions by Mr. Kemp.

Q. Your name?
A. S. J. Saunders.
Q. Age?
A. 48.
Q. Occupation?
A. Night Yardmaster.
Q. How long have you been in the service of the D&RGW?
A. Little better than twelve years.
(Statement.) Mr. Kemp: For the purpose of the record I want to state that we have been advised that we have lost the Ford business on account of our handling at Denver in switching of these cars.
Q. Mr. Saunders, tell me what you can about the handling of this car, MP 77386, autos for the Ford Motor Company, which arrived at Denver at 4:20 A. M. September 17th on First 66.
A. Well, I can't tell you anything wrong with the handling of it. I was engaged in other service at the time. I had to get out and handle an engine instead of doing my own work and was not in a position where I could help him. When I went to Denver I asked Mr. Ellis how he was doing and he said that he had that wooden headed Devore on the main line with about forty cars from the UP and said he didn't know where any of them went and asked me if I couldn't go out and help him get rid of that cut. I went out and saw that he had one of the cars marked wrong and had to mark the cars different and switch them for him. We had to use the two main lines. Lined up the Barnham stuff

on the outbound main and the Denver stuff on the inbound. It was impossible to get into the yard at the present time account another engine using the lead. When we got a chance to use it we took the cars into the yard. Devore took the ice house so that he could have the space for icers. And I did so, came to Burnham, got cab for Second 15's train, took it down to 11th St., also car of oranges for No. 92 on the Rock Island and I had to clear the main line for Second 15 and brought the cut to Burnham. Went back the inbound main to shove Second 1's train down with First 1's train and cut it off on the main line south of 11th St. and went back and against Second 1's train and we was getting in short time. Second 15 due out then. Towerman informed me that Second 15, or Dorsey, had notified him that Second 15 would be five or ten minutes late and he didn't know just when they would come out, as they were waiting for passengers. But he wanted to know how many cars I had in Second 1. I informed him seven. And he said that he thought that track No. 2 in the Union Depot would hold them as there were baggage cars in there and Rock Island No. 5. I started down to see if I could get hold of Dorsey so that we could shove Second 1 into track 2 into the depot; as I got to 15th Street, Second 15 started pulling out and as we had instructions to put Second 1 on track No. 9 at the Union Station. I went back to shove Second 1 into Track 9. The towerman said that he had got hold of Dorsey and to shove them in on Track 2, which we did. We had to couple into the baggage cars and then shove the baggage cars down a ways to hold Second 1's train. There was no chance for me to let Devore go alone, as if I had we could have delayed both Second 15 and Second 1. That is about all I can say on that. Devore was incapable of handling an engine and there wasn't anybody on the crew that could handle it. I begun to think that I would have to pull down and head into the yard with Second 1's train. If Second 15 hadn't got out when they did I would probably have had to do that.

Q. The question is, Mr. Saunders, what did you do about this car of Fords for the Ford Motor Company that arrived at 4:20 A. M.?

A. I didn't know anything about the handling of this car, as I couldn't leave this engine to go to the office to help Ellis.

Q. Are you familiar with the instructions on the handling of Ford business?

A. Yes, sir.

Q. What time were you supposed to deliver this to the C&S in order for them to get it out to the Ford plant?

A. 6 o'clock.

Q. Did you check First 66's consist on this date to see what business they had?

A. No, sir. I didn't get to see their consist at all. I saw the consist for Second 66 but I didn't see First 66's consist.

Q. Did you make a written report to the assistant trainmaster in regard to this Foreman Devore?

A. Yes, sir.

Q. Why did you feel like you had to do his work for him?

A. Somebody had to do it.

Q. Why didn't you call in another foreman for the engine?

A. I didn't know who to call. There was no helpers capable. We had the engine 1159 go to work up here and Mr. Ellis asked to have me and the foreman on the 1159 Burnham job to come to Denver and handle the river job.

Q. What is your understanding on the importance of handling Ford business?

A. It is very important to handle Ford business. It always has been.

Q. Is it the understanding that the handling of this business must be given preference?

A. It must be given preference but not when it comes to delaying a passenger train. If I had tied up down there and delayed Second 15, and No. 1 and 16, then they would have said something.

Q. How could this have happened?

A. By not getting an engine down there to handle it. As we had the main to clear, the ice house to pull, the cut on the main line forty cars, to switch. Had to come up here and get a caboose and oranges for 92 and deliver them. I didn't see where I could have done anything else.

Q. At what time did you go down to Denver Yard and talk to Asst. Yardmaster Ellis?

A. It was about 2:25 when I got down there and I guess it was about 2:35 when I went out in the yard.

Q. Prior to that time had you checked the consist of First 66 and Second 66?

A. I checked the Second 66 but not First 66. If the consist of First 66 was in there I did not see that. I

couldn't find it on the desk any place and I went out to see Mr. Ellis and he wanted me to help Devore so I never got back to the office.

Q. You made no effort before you even talked to Ellis to find out what was on First 66?

A. I looked for First 66's consist but I never got back.

Q. How many cars did Devore have in his pull from the UP?

A. About forty cars, and they was mixed up pretty bad. There was downtown stuff and Burnham stuff.

Q. You felt then that it was your responsibility then to do the switchman's work instead of handling your work as yardmaster in the yard?

A. It was a case of compulsory.

Q. Would you have been responsible for Mr. Devore doing his work wrong?

A. I would have been responsible if I had allowed a delay to Second 15, 1 and 16. If he had done his work wrong I would have been responsible. It is up to me to see that the work is done. Somebody has got to do it.

Q. Did you say anything to Mr. Ellis, or did Mr. Ellis say anything to you about First 66 having any business for Ford?

A. No, sir.

Q. You made no effort to find out whether First 66 had any business for Ford?

A. I had no chance to find out.

Q. The consist of this train was in here before 4:25 A. M.—that was the time you went down to Denver?

A. Yes, sir.

Q. Why weren't you able to find out then?

A. It was time for me to go to Denver.

Questions by Mr. Rice:

Q. Then you didn't check the consist of First 66?

A. No, sir. As far as I recall it wasn't checked unless Mr. Ellis checked it.

Q. Then you didn't know this Ford business was in town?

A. No, sir.

Questions by Mr. Fields:

Q. Who usually delivers those consists?

A. Messenger boys.

Q. Usually put them on your desk?

A. Yes. Usually sometimes you find them and sometimes you can't.

Q. You know what time First 66 got in?

A. No, I don't know the exact time when the First 66 came in but the last order we had on 66 was 4 o'clock.

Q. Do you help check the consists of all the trains?

A. As a rule, yes.

Q. You sure it wasn't on your desk there?

A. It could have been covered up. Helping Devore out why I just overlooked doing it, I guess. I never got back to the office to do it. A man shouldn't have to go out and help a foreman.

Questions by Mr. Albaugh:

Q. When business is good does it take most of your time keeping engines straightened out?

A. It does when you have inferior help.

Q. Was the yard pretty well filled up with cars?

A. Yes it was.

Further questions by Mr. Kemp:

Q. Mr. Saunders, at what time was this car delivered to the C&S?

A. As I understand it didn't get over there until after 7 o'clock.

Q. Do you know what time First 66 arrived at Burnham?

A. I understand it arrived at 4:20.

Q. Is there also a copy of this consist for the operator at Burnham to card the train from?

A. Yes, but they take the copy to Denver.

Q. Was there any misunderstanding on your part at all as to the preferred handling that must be given this business?

A. No, sir.

Q. Knowing the positive instructions out on the handling of this Ford business, why didn't you make sure whether First 66 did or did not have Ford business?

A. I didn't have a chance.

Q. Before you started doing all this extraneous work why didn't you find out?

A. I didn't have time to do it.

Q. You knew that certain things had to be given preferred attention?

A. Yes, sir.

Q. Part of your duties as night yardmaster was to supervise this work and see to it that it was given preferred attention, was is not?

A. Yes, sir.

Further questions by Mr. Rice:

Q. How long has Mr. Devore been working here?

A. About two or three years.

Q. Is this the first time he has been a foreman down there?

A. He was foreman a couple of weeks ago.

Q. Well, after your experience with him that night did you do anything about him?

A. I went right up to Mr. Crowley, clerk, and told him not to call him as foreman any more.

Q. You didn't report it to the General Yardmaster?

A. Yes, I told the General Yardmaster too.

Testimony of Mr. F. L. Ellis—Questions by Mr. Kemp:

Q. Your name?

A. F. L. Ellis.

Q. Age?

A. 37.

Q. Occupation?

A. Assistant yardmaster.

Q. Were you on duty in the Denver yard as assistant yardmaster on the morning of September 17th?

A. Yes, sir.

Q. What do you know about the delay in handling this car of automobiles that came in on First 66 on this date?

A. Well, I really didn't know the train had Fords. We have a new operator on at Burnham and the operator we formerly had I could get him on the arrival of the inbound trains and he would give me the number of cars and make me a list on the phone. He would say so many UPs and contents, so many Qs, etc. Then when I sent an engine after the train I knew exactly what the train had. But on this particular morning I didn't get a list. The operator has been having trouble carding the trains. So, as a rule when I call the operator for a line up on the train he can give me the contents but he can't give me the routing and I didn't know the train had Fords. I had a new crew on this engine that night handling 66 on this particular morning and I told him to deliver the UPs as he said he had 10

or 12 UPs and to switch the Q out of No. 2 and the C&S to 3. I then had to double the Q back on to the No. 3 and I was figuring on making a quick delivery on the south end of the yard on account of First and Second 1 on the inbound main, and the UP cut on the outbound. I knew that Tower A would be busy at that time of the morning with the UP passenger work and the D&RGW passenger work. In the meantime 91 arrived. I had 77 ordered for 6:30 A. M. So had first 78 switched, and the Rock Island blocks placed as near as possible for quick handling. After the arrival of second 78—had figure at 5:30 A. M. Utah Junction Second 78. Didn't want to block that Second 78 in the Union Depot as I knew his arrival time would be around 6:30 A. M. I had the 10:30 P. M. engine working at south end of the yard and making up 77 and 77 was made at 6:50 A. M. and by that time the engine from the east end of the yard came around to the south end and I had connecting lines on Tracks 2 and 3 for delivery to CB&Q and C&S. Looked like time would be too short to put a man out on the inbound ahead of No. 16 to crossover ahead of Second 15 due out of Union Station 6:59 A. M. on account specials usually 10 to 15 mins. late out of Union Station. At 7 A. M. I told the assistant yardmaster, Feehan, at Denver that I hadn't delivered the connecting lines out of 66 and figured on using a 7 A. M. Denver engine to make deliveries.

Q. What is your understanding of the instructions about the handling of this Ford business?

A. That they must be given preferred handling.

Q. Was it given preferred handling on this date?

A. I didn't know the train contained Fords.

Q. Did you ask the operator at Burnham whether the train had any Fords in it?

A. No.

Q. Could you have done this?

A. I probably could if had the time, but the yard was blocked and I had trains coming from both the south and west and they were sawing down, and I was trying to keep the yard open, especially for Second 78.

Q. Did you make any effort to look at the consist of First 66?

A. I went through the consists that were laying on the desk and found the consists of both 78s but don't recall looking at the consist of First 66.

Q. Did you make any effort to see if there were any

Fords on First 66 on that date? Especially, in view of the fact that you had to give this business preferred handling?

A. I looked over all the consists on the desk, looking for Fords or anything that they contained. I don't recall seeing First 66's consist.

Q. This business for Ford on which you had instructions to give preferred handling, usually comes into Denver on 66, or a section of 66, does it not?

A. Yes.

Q. The point I am trying to bring out is that you had instructions to give this business preferred attention. In order to give business preferred attention you must know whether that business is rolling into the terminal and if you don't know that business is rolling into the terminal you can't give such business preferred attention, is that correct, Mr. Ellis?

A. Yes sir. My method of a look at the consist is every time that I go into the office. I go through the consist and reports from the transfers and I usually go through the desks thoroughly at 11 P. M. and maybe I won't get back for at least 1½ or 2 hours. On this particular morning I had a new man on this lead engine. I had to get the icers for the house out of wagon tracks 14, 15, and 16, believe it was, and also get out fill and I was afraid that if a sent a new crew down there I couldn't get the house set up before 9:30 or 10 A. M.

Q. Was the work on this morning any different on this date from the past several mornings previous to that?

A. It wasn't any different but the yard was left a little different condition. My statement shows that I sent fifty Burnham loads out of Denver and I still had 26 Burnhams on the outbound main and 24 on No. 17 and was pulling transfers then. When I came to work at 11 P. M. 17 had Burnhams, about 15 cars, and Track 2 was full of a cut to switch from connecting lines and 3 had 8 or ten cars to switch from connecting lines, and No. 8 had a C&S cut to switch.

Q. The fact remains, however, Mr. Ellis, that this business of Ford's under which everyone has been lined up to give preferred attention was given no attention at all, is that correct?

A. No, not hardly. It wasn't given preferred attention on this morning, but it was given the attention that 66's connecting lines usually get.

Q. Mr. Saunders stated that he didn't know there were any Fords on this train and you stated you didn't know there were any Fords on this train, why couldn't it have been given preferred attention?

A. Well, we give 66 quick deliveries whether we know there are any Fords or not, that is, as quick as possible. The CB&Q had cars in there on 66 that were almost as hot as the Fords, I think perishable and so did the UP.

Questions by Mr. Rice:

Q. How are the consists handled on the arrival of trains at Denver?

A. The operator takes them at Burnham and then the question is how to get the consist to Denver. If there is anyone coming to Denver, like the yardmaster or anybody, they usually bring them to Denver yard. If not, the freight house sends a messenger after them.

Q. What system have you of checking a consist?

A. They are usually placed on the yardmaster's desks and the yardmaster can check them then.

Q. Are they always checked for these important movements?

A. Yes, sir.

Q. Well, then, how do you account for not being able to check 66 this morning?

A. As a rule on 66's arrival I generally call Burnham yard and ask him how many cars in the train. Then when the conductor brings the bills and gives them to the yard office, I call back again and he reads the list and I in turn take it over the telephone at Denver.

Q. Was this done that night?

A. No.

Q. Then you depend on getting the consist down to Denver later and getting the information?

A. Well, I missed the consist. I had 91 in town and I was arranging the tonnage for 77 and had him made at 6:50 A. M.

Q. Then this car was thrown into the C&S cut and taken over immediately?

A. Yes, sir.

Questions by Mr. Albaugh:

Q. Is there anybody in the office that could check those consists besides you?

A. Well, on inbound stuff, the consist from the west,

the freight house checks them and they figure the tonnage on the Rock Island trains and card the Rock Island.

Q. Was there anybody that checks the trains from the south?

A. Yes, there is a clerk that checks the trains from the south and notifies connections.

Q. Doesn't he know the value when he has important cars in the train to be handled?

A. Sometimes he does and sometimes he doesn't.

Q. Doesn't he have to tell you?

A. I don't know whether he has to or not. When we have important loads off the wagon track why he will come out in the yard and deliver the order to you.

Q. Did anyone deliver to you First 66's consist?

A. No sir. If it came to Denver yard it came with the other consists and switch orders.

Q. Does it keep you pretty busy out in the yard when you have lots of trains to handle?

A. Yes.

Q. Do you have a chance to get over to the office to check your consist and important orders often?

A. You just have to settle down when you have new men working in the Denver yard. On this night I had two new crews. The 77 was pretty important to get out on time. I would have given the Fords preference in handling if I had known the train contained Fords.

Q. Were both the main lines blocked?

A. Yes sir.

Q. Was it necessary for you to clear them?

A. Yes sir.

Questions by Mr. Fields:

Q. At different times during the night you check the consists?

A. Yes.

Q. When night yardmaster is at 4th Avenue or elsewhere, then, you make a particular effort to check the consists, do you?

A. Yes. I make a particular effort whether he is at 4th Avenue or Denver.

Q. Is it the duty of both of you to check the consists?

A. Yes, sir.

Q. So, I suppose when you know that he is not there, why you make a particular effort to check them more than you would if you knew he was right in the office?

A. Yes, sir.
Q. And you try to cooperate on that, do you?
A. As much as possible.

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The evidence of record does not justify the action of the carrier in assessing discipline in this case.

Award

Claim sustained.

National Railroad Adjustment Board
By Order of First Division
Attest: (Sgd) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 31st day of March, 1938.

Endorsed: In the District Court of the United States. * * (Caption—3788) * * Petition for Declaratory Judgment. Filed Jan. 12, 1942, Hoyt King, Clerk.

38 And afterwards on, to wit, the 2nd day of February, 1942, came the Defendants, F. J. Williams, et al. by their attorneys and filed in the Clerk's office of said Court their certain Answer, in words and figures following, to wit:

39 In the District Court of the United States.
* * (Caption—3788) * *

ANSWER OF F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, R. E. EDRINGTON AND FRED LEWIS, DEFENDANTS.

Now come the defendants, F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis, by Leo J. Hassenauer, their attorney, and for answer to the complaint of The Order of Railway Conductors of

America and the Brotherhood of Railroad Trainmen, heretofore filed in this cause, allege:

1. These defendants admit the allegations contained in paragraphs 1, 2, 3, 4 and 5 of said Complaint.

2. These defendants admit the allegations contained in paragraph 6, and allege further that three members of the Fourth Division of the National Railroad Adjustment Board are selected by labor organizations of the employees, national in scope, which have been organized in accordance with the provisions of Section 2 of the Railway Labor Act, as amended.

3. These defendants further allege that said three members of the said Fourth Division of the National Railroad Adjustment Board were selected by employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and which said three members of the Fourth Division are executive officers of the International Longshoremens' Association, the Inland Boatmens' Union of the Pacific and the National Marine Engineers' Beneficial Association, voluntary unincorporated associations.

3. Defendants admit the allegations contained in paragraph 7 of the Complaint.

These defendants allege further that the decree entered by the District Court of the United States, for the Northern District of Illinois, Eastern Division, in Chancery No. 16031, wherein the Fourth Division of the National Railroad Adjustment Board was directed and commanded to take jurisdiction of three individual disputes of Yardmasters and to render awards thereon was entered without the knowledge of these defendants.

These defendants further allege that the three members of the said Fourth Division of the National Railroad Adjustment Board selected by the labor organizations of the employees, national in scope, filed no appearance, answer or objection to the aforesaid proceedings and that said proceedings were conducted and heard upon the sworn complaint and upon the answer filed by the three members of the Fourth Division of the National Railroad Adjustment Board selected by the carriers and which answer, as from the record in this Court will more fully appear, admitted the allegations contained in said complaint.

These defendants further allege that since the entry of the aforesaid decree, hearings have been held on the First

Division of the National Railroad Adjustment Board in accordance with the jurisdiction conferred on said Board by the Railway Labor Act, as amended; that jurisdiction was taken of disputes involving Yardmasters as coming within the jurisdictional provisions of Section 3(h) of the Railway Labor Act, as amended; that hearings on said Yardmasters' disputes were held without objection by the members of the said First Division or of the respondent carriers, and that awards were rendered thereon.

41 These defendants further allege that the administrative interpretation of the jurisdictional provisions of the First Division, under Section 3(h) of the Railway Labor Act, as amended, by all of the defendants herein, either separately or together with a referee selected and appointed by the National Mediation Board, was an administrative determination, interpretation and finding within the spirit of the Railway Labor Act, and that said interpretation should be recognized and given credit by this Court.

Further answering Paragraph 7 of the complaint these defendants allege that no power exists in the members of the First Division of the National Railroad Adjustment Board to issue or cause to be issued the statement marked Exhibit "C" of the complaint to these defendants, in which Exhibit it was proposed that the Fourth Division of the National Railroad Adjustment Board hear, determine and enter awards on certain disputes referred to in said Exhibit.

4. These defendants admit the allegations contained in Paragraph 8 of said Complaint.

5. These defendants admit the allegations contained in Paragraph 9 of said Complaint.

6. These defendants admit the allegations contained in Paragraph 10 of the Complaint.

7. These defendants admit the allegations contained in Paragraph 11 of the Complaint and allege further that as members of the First Division of the National Railroad Adjustment Board they were unanimously in favor of holding hearings in and rendering awards on the disputes mentioned in Exhibit "C".

These defendants further allege that as representatives of the standard railroad labor organizations, the members of which are engaged in train and yard service, they are qualified and informed by experience to hear and decide disputes involving Yardmasters.

These defendants further allege that the First Division of the National Railroad Adjustment Board, as constituted under Section 3(h) of the Railway Labor Act, is in
42 session at all times and that said First Division, because of the jurisdiction conferred thereon by said Railway Labor Act to have jurisdiction over disputes involving train and yard service employees of carriers are better equipped and qualified, because of their experience, to hear disputes involving Yardmasters and to render awards thereon.

These defendants further allege:

That in a certain bill to amend the Railway Labor Act with respect to the National Railroad Adjustment Board, Bill #S.4375, it was proposed by the American Short Line Railroad Association that Section 3(h) of the Railway Labor Act, as amended, be further amended in the following particulars:

"(9) (a) The First Division of the Adjustment Board shall have jurisdiction over disputes involving train and yard-service employees of carriers including engineers, firemen, hostlers, outside hostlers, helpers, conductors, trainmen, and yard-service employees, except yardmasters and other subordinate officers."

(a) The above proposed amendment to the Railway Labor Act to except yardmasters from the jurisdictional provision of Section 3(h) of the Railway Labor Act, more particularly to restrict the jurisdiction of the First Division of the National Railroad Adjustment Board, is persuasive that by the proposed amendment it is sought to limit the jurisdiction of the said First Division as at present provided for.

(b) That the issuance of awards heretofore rendered involving yardmasters' disputes by said First Division without any objection to the jurisdiction of said First Division to hear, consider and render awards in disputes involving yardmasters constitutes an administrative interpretation of the jurisdictional provisions of the Railway Labor Act governing the jurisdiction conferred on said First Division and that said administrative interpretation should not be interfered with by this Court but that this Court should grant the relief prayed for in the complaint and to render a declaratory judgment that all disputes involving yardmasters as yard-service employees shall be heard and determined by said First Division and that a de-

eree be entered herein in accordance with the prayer for relief as contained in said complaint ordering the said First Division to hear and determine all disputes involving yardmasters as yard-service employees, including
43 those disputes set forth in Exhibit "C" attached to the complaint, together with all other disputes presented to said First Division of the National Railroad Adjustment Board since the issuance of said Exhibit and all such unadjusted disputes which may arise on the property of any carrier subject to the provisions of the Railway Labor Act.

(c) These defendants further pray for relief and a declaratory judgment and that the Court adjudge:

1. That the decree heretofore entered in chancery #16031 be declared to be final and binding only with respect to the three disputes set forth in that complaint.

2. That said complaint did not constitute a class suit as would be final and binding upon any of the standard railroad labor organizations representing yardmasters in proceedings before the First Division of the National Railroad Adjustment Board.

3. That the First Division of the National Railroad Adjustment Board has jurisdiction over disputes involving yardmasters.

That these defendants recover their costs.

Leo J. Hassenauer,
Attorney for F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis, Defendants.
Address: 105 W. Adams Street
Chicago, Illinois.

Endorsed: In the District Court of the United States • • • (Caption—3788) • • • Answer of F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis, Defendants. Filed Feb—2 1942 at 3:15 o'clock PM Hoyt King, Clerk. $5.00 H. M. W. Leo J. Hassenauer, Attorney for Certain Defendants, 105 W. Adams Street, Chicago. Central 8177.

44 And afterwards on, to wit, the 9th day of February, 1942, came the Defendants E. W. Fowler, et al by their attorneys and filed in the Clerk's office of said Court their certain Answer, in words and figures following, to wit:

45 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—3788) * *

ANSWER OF DEFENDANTS E. W. FOWLER, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, AND L. O. MURDOCK

The joint and several answer of defendants E. W. Fowler, T. K. Faherty, R. A. Knoff, L. L. McDonald and L. O. Murdock to the complaint of the plaintiffs above named, respectfully shows:

I.

These answering defendants allege that they have no information or belief sufficient to enable them to answer the allegations contained in that part of paragraph 1 of the complaint, commencing with the words "The plaintiffs," in line 16 on page 2 of said complaint, and ending with the words "or not," in line 21 on said page 2, and therefore deny each and all such allegations.

These defendants admit the allegations set forth in the remainder of said paragraph 1.

II.

Answering paragraph 2 of the complaint, these defendants, E. W. Fowler, T. K. Faherty, R. A. Knoff, L. L. McDonald and L. O. Murdock, show that they are duly
46 selected, compensated and continued in office as the Carrier Members of the First Division of the National Railroad Adjustment Board, pursuant to the provisions of Section 3, First (b) of the Railway Labor Act. For the sake of convenience, they are designated in this answer as the "Carrier Members."

Defendants F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis, who are members and national officers of the Order of Railway Conductors of America, Brotherhood of Locomotive Engineers,

and the Brotherhood of Locomotive Firemen and Enginemen, respectively, are duly selected, compensated and continued in office as the Labor Members of said First Division of the National Railroad Adjustment Board. For the sake of convenience, said defendants last-mentioned are designated in this answer as the "Labor Members."

The Carrier Members admit all of the allegations of said paragraph 2, except as above qualified, and except also that they deny that they or the Labor Members of said First Division are "permanent" members thereof, in this respect alleging that the Railway Labor Act makes no provisions for "permanent" tenure of office by the members of said Board.

III.

Answering paragraph 3 of the complaint, the Carrier Members admit that this is a suit of a civil nature for a declaratory judgment, brought pursuant to the Federal Declaratory Judgments Act of 1934 (28 U. S. Code 400), and arising under the Railway Labor Act, as amended (45 U. S. Code 151-163); in that there is involved in this suit the construction and interpretation of certain provisions of said Railway Labor Act; these defendants therefore admit that this Court has jurisdiction of this action, and of the parties thereto.

47 IV.

The Carrier Members, answering the allegations of paragraph 4 of the complaint, admit the filing of a so-called ex parte submission by the Order of Railway Conductors of America against the Great Northern Railway Company with the First Division of the National Railroad Adjustment Board, and admit that the Great Northern Railway Company in said Docket No. 6404 protested the hearing or rendition of any award in said dispute, on the ground that jurisdiction over the said dispute is not vested in the First Division. The Carrier Members deny that V. E. Benjamin and M. L. Nagle, yardmasters, are "otherwise known as yard-service employees," and aver to the contrary that when acting as yardmasters they are subordinate officials exercising managerial functions. The Carrier Members admit that Exhibit "A" annexed to the complaint is a copy of the ex parte submission filed on behalf of said yardmasters but deny that the statements therein

are true and correct, except as otherwise herein admitted; and they attach hereto, marked pages 1 to 18 of the Appendix to this answer, true and correct copies of two documents filed by the Great Northern Railway Company in answer to said ex parte submission, and by this reference said documents are made a part of this answer. The Carrier Members deny all other allegations of paragraph 4 of the complaint.

V.

Answering paragraph 5 of the complaint, the Carrier Members deny that Assistant Yardmaster W. W. May is "otherwise known as a yard-service employee." They admit that on January 4, 1941, the Brotherhood of Railroad Trainmen on behalf of W. W. May purported to present and file in said Docket No. 12295 an ex parte submission with said First Division against the Southern Pacific Company (Pacific Lines), and that Exhibit "B" an-
48 nexed to the complaint is a copy thereof, but deny that the statements therein contained are correct, except as otherwise herein admitted. Said Carrier Members also admit that on the 24th day of March, 1941, the Southern Pacific Company (Pacific Lines) filed its simultaneous answer to said ex parte submission wherein it protested the acceptance, hearing of or rendition of any award in said dispute by the First Division, on the ground that jurisdiction over disputes between carriers and yardmasters is vested in the Fourth Division.

The Carrier Members deny each and every other allegation of paragraph 5 of the complaint not herein specifically admitted.

Attached hereto, and marked pages 19 to 32 of the Appendix to this answer, and by reference made a part hereof, is a true and correct copy of the said ex parte submission filed by said Southern Pacific Company in said Docket No. 12295.

VI.

These defendants, answering the allegations of paragraph 6 of the complaint, show that the Fourth Division of the said National Railroad Adjustment Board, created under Section 3, First (h) of the said Railway Labor Act, is composed of six members, three of whom are selected by the carriers and the other three by national labor organizations of the employees. The labor organizations and

the members selected by them holding office from time to time on the Fourth Division have been and are as follows:

The National Marine Engineers' Beneficial Association selected Charles M. Shephar, who was succeeded March 25, 1935, by William S. Brown, who in turn was succeeded April 2, 1937, by S. J. Hogan, who on March 31, 1941,
49 was succeeded by the present incumbent, J. H. Blake; and the International Longshoremen's Association selected J. J. Noonan, who on March 14, 1936, was succeeded by R. A. Walton; and the Inlandboatmen's Union of the Pacific selected C. W. Deal, who on March 31, 1941, was succeeded by J. M. Fox.

The Carrier Members of the First Division, defendants, further admit that the Fourth Division has the jurisdiction specified in Section 3, First (h) of the Railway Labor Act. All other allegations of said paragraph 6, not otherwise expressly admitted, are denied by the Carrier Members.

VII.

The Carrier Members, answering the allegations of paragraph 7 of the complaint, admit that on August 28, 1941, they wrote to the Labor Members the letter which is made Exhibit "C" to the complaint, in which they advised the Labor Members that they would not participate in any consideration of the merits in nine specified dockets, among which were Dockets Nos. 6404, and 12295. The other Dockets, Nos. 12101, 12277, 12278, 12280, 12294, 10665, and 11801 are likewise still pending, the Carrier Members having refused to consider the claims there contained upon the merits, holding the view that the First Division lacks jurisdiction. Since that date the Carrier Members have determined, and advised the Labor Members in a letter identical with Exhibit "C" of the complaint, that the First Division does not have lawful jurisdiction in the following additional claims and disputes:

Docket No. 10109—Conductors *vs.* Louisville & Nashville R. R.

Docket No. 6837—Trainmen *vs.* Chicago and North Western Ry.

Docket No. 6406—Conductors *vs.* Chicago and North Western Ry.

Docket No. 13318—Conductors *vs.* Monongahela Ry.

Docket No. 4535—Trainmen *vs.* International Great Northern Ry.

Docket No. 4536—Trainmen *vs.* International Great Northern Ry.

Docket No. 6644—Trainmen *vs.* Florida East Coast Ry.

Docket No. 8970—Trainmen *vs.* The Central R. R. Co. of N. J.

Attached hereto, as a part hereof, is a true and correct copy of the submissions of the respective carriers and
50 petitioning labor organizations involved in all of the above dockets. The statements in the respective submissions of the petitioning labor organizations are denied except as otherwise admitted in the submissions of the respective carriers. The aforesaid submissions appear in the Appendix hereto as the following pages:

Docket No. 10109—Conductors *vs.* L. & N. R. R., Appendix pp. 33 to 44.

Docket No. 6837—Trainmen *vs.* C. & N. W. Rwy., Appendix pp. 45 to 50.

Docket No. 6406—Conductors *vs.* C. & N. W. Rwy., Appendix pp. 51 to 69.

Docket No. 13318—Conductors *vs.* Monongahela Rwy., Appendix pp. 70 to 92.

Docket No. 4535—Trainmen *vs.* Intl. Gr. Nor. Rwy.; Appendix pp. 93 to 103.

Docket No. 4536—Trainmen *vs.* Intl. Gr. Nor. Rwy., Appendix pp. 104 to 120.

Docket No. 6644—Trainmen *vs.* Fla. East Coast Rwy., Appendix pp. 121 to 152.

Docket No. 8970—Trainmen *vs.* Cen. R. R. Co. of N. J., Appendix pp. 153 to 171.

Docket No. 12101—Trainmen *vs.* Sou. Pac. Co. (Pac. Lines), Appendix pp. 172 to 222.

Docket No. 12277—Trainmen *vs.* Sou. Pac. Co. (Pac. Lines), Appendix pp. 223 to 240.

Docket No. 12278—Trainmen *vs.* Sou. Pac. Co. (Pac. Lines), Appendix pp. 241 to 263.

Docket No. 12280—Trainmen *vs.* Sou. Pac. Co. (Pac. Lines), Appendix pp. 264 to 283.

Docket No. 12294—Trainmen *vs.* Sou. Pac. Co. (Pac. Lines), Appendix pp. 284 to 298.

Docket No. 10665—Trainmen *vs.* Sou. Pac. Lines (T&L), Appendix pp. 299 to 385.

Docket No. 11801—Trainmen *vs.* M. St. P. & S. S. M. Rwy. Co., Appendix pp. 386 to 408.

The Carrier Members deny each and all of the allegations of the second and third paragraphs of paragraph 7 of the complaint, in which the plaintiffs set out their legal conclusions respecting the decree entered by this Court in Chancery No. 16031.

VIII.

Answering paragraph 8 of said complaint, the Carrier Members admit that, substantially as alleged in said paragraph, said First Division undertook to exercise jurisdiction over and to render awards upon the disputes referred to in said paragraph, and that the several exhibits "D," "E," "F" and "G" annexed to said complaint are copies of said awards; but the Carrier Members further allege that no question as to the juirsdiction of said First Division to consider, or hear, or determine said disputes was raised by any of the respective carriers respondent in said proceedings. The Carrier Members also allege and show that, as members of the First Division, they have without objection joined the Labor Members thereof in accepting jurisdiction over certain claims of persons classed at
51 times as yardmen and at other times as yardmasters, for compensation which said claimants might or should have earned pursuant to certain promotion rules appearing in Yardmen's Agreements; but allege further that no such issue is involved in either or any of the disputes specifically mentioned and referred to in paragraphs 4 and 5 of the complaint, or in any of the disputes now pending before the said First Division and which are referred to by docket number in paragraph VII of this answer. The Carrier Members also aver and show that they have likewise jointed with the Labor Members in accepting jurisdiction over numerous other disputes involving claims derived from and based upon provisions in the schedule agreements made by the representative of and concerning the yardmen (such as cases where a yardmaster has been performing yardmen's work); that there is attached hereto, and by reference made a part hereof, as page 409 of the Appendix to this answer, a statement showing by number each of some 15 awards, rendered in disputes of

the character last described; that said 15 cases are typical and representative of a large number of substantially similar cases, all of which differ, as to the essential points in issue, from the cases listed and referred to by docket number in paragraph VII of this answer. In a number of other cases jurisdiction has been entertained by the First Division with whom a referee participated. Typical of these cases, which were handled upon the merits over the objection of the Carrier Members, is that covered by Award No. 1896, being a dispute between the Switchmen's Union of North America and the Chicago, Rock Island & Pacific Railway Co., in which a referee, Mr. Frank P. Douglass, participated with the Labor Members and in which the Carrier Members dissented.

IX.

Answering paragraph 9, the Carrier Members deny the allegations of said paragraph, except they admit that the duties of yardmasters include directing the work of the classes mentioned in sentence one, paragraph 9, al-
52 though such direction is not exercised solely by yardmasters. In this behalf the Carrier Members allege and show that in the performance of their duties railroad yardmasters have charge of yards and are responsible for conditions within such yards; that trains and engines, and all employees in train, engine, or yard-service within yards are subject to their direction and control; that they are required to see that employees within yards are in condition for the proper discharge of their duties; that they are responsible for the proper make-up, break-up, and movement of trains through yards, the prompt and proper handling of cars, and fulfillment of all requirements as to the movement, switching and protection of cars and of the freight contained therein. In the discharge of these, their said duties, yardmasters necessarily exercise a substantial measure of individual initiative and responsibility. They form and, in general railroad practice, have been recognized as forming, a distinct class of supervisory employees; and because of their responsibilities and character of supervision and direction which they are required to and do exercise, all as above described, they have been classed and are generally referred to and designated as "subordinate officials," and are not and never have been classed or described or regarded as "yard-service employees" within the estab-

lished meaning of that term as understood and employed in the railroad industry, or as the same appears in Section 3, First (h) of the Railway Labor Act. Yardmasters are not "yard-service employees" within the meaning and intent of paragraph (h) of Section 3 of the Railway Labor Act. Yardmasters are invested with authority over the following classes of employees working in yards, in their whole or part time:

(1) Yard Locomotive Engineers.
(2) Yard Locomotive Firemen.
(3) Yard Engine Firemen
(4) Yard Helpers and Switchtenders.
(5) Yard Clerical Forces.
(6) Telephone and Telegraph Employees in Yard Offices.
(7) Towermen operating interlocking switches.
(8) Yard Section Foremen and Laborers
(9) Signal Department Forces while engaged in maintenance of yard signal plants.
(10) Car Inspectors and Repairers.

53 The classes numbered (1), (2), (3), and (4) are known as "yard-service employees"; but though engaged in yard work, the classes numbered (5), (6), (7), (8), (9), and (10) are not "yard-service employees", despite being supervised by yardmasters when performing work in yards, as some may be engaged during their whole time.

The classes numbered (5), (6), (7), (8) and (9) in the specification just given are subject to the jurisdiction of the Third Division, pursuant to Section 3, First (h) of the Railway Labor Act, and the class numbered (10)—Car Inspectors and Repairers—is subject to the jurisdiction of the Second Division.

X.

Answering paragraph 10 of said complaint, the Carrier Members admit that, substantially as alleged in said paragraph 10, no further remedy or relief can be obtained from the defendants, the ten members of the First Division of the National Railroad Adjustment Board, toward the hearing and determination by said First Division of disputes involving yardmasters and arising out of the service of yardmasters as employees of carriers performing supervisory duties; but the Carrier Members deny each and every other allegation of said paragraph 10, and deny in particular that said plaintiffs have pursued, undertaken,

or exhausted any remedy or remedies available to them, under the Railway Labor Act or otherwise, for the purpose of obtaining the hearing and determination of disputes involving yardmasters, as aforesaid, by the Fourth Division of said Board. In this behalf the Carrier Members allege and show that exclusive jurisdiction to hear and determine such disputes is by law vested and resides in said Fourth Division.

Further answering said paragraph 10, the Carrier Members deny that they are without interest in regard to the relief prayed for herein, showing that in such event no controversy would be presented upon which this Court could enter a declaratory judgment; and to the contrary,
54 the Carrier Members allege that they have the duty and responsibility, particularly owed to the railroads subject to Part I of the Interstate Commerce Act which they represent and in the public interest, to confine the jurisdiction of the First Division to those disputes which may legally and validly be brought before it within the jurisdiction stated in the Railway Labor Act. In this connection the Carrier Members further allege that it would be contrary not only to law, but also to the interest of the railroads subject to the Interstate Commerce Act and to the public interest for this Court to declare that the First Division has exclusive jurisdiction "of disputes involving yardmasters as yard-service employees", since to do so would deprive all of those yardmasters not represented by either the Order of Railway Conductors or the Brotherhood of Railroad Trainmen of all opportunity to try their claims and disputes before an adjustment board duly constituted in accordance with law, and to the contrary, would leave such yardmasters subject to awards by the First Division of the Adjustment Board composed, to the extent of 70 per cent, of persons opposed in interest to the success of their claims against the employing carriers. Upon numerous railroads, yardmasters as a craft or class are represented by a standard railroad labor organization known as the Railroad Yardmasters of America, which organization undertakes also to handle the claims of individual yardmasters with the Fourth Division. If any such claims are or may hereafter be compelled to be presented to the First Division, the five Carrier Members will naturally be adverse to sustaining any claim to which the employing railroad offers a valid defense; the representative of the Order of Railway Conductors and the representative

of the Brotherhood of Railroad Trainmen, as members, officers and representatives of labor organizations, which are energetic rivals of the other organizations largely representing yardmasters, are not disposed, and as a matter of rival organization policy and custom, will refrain from adding to the prestige and influence of any of said yard-
55 masters' organizations by bringing yardmaster claims to a successful conclusion before the First Division.

XI.

Answering paragraph 11, the Carrier Members deny each and every allegation of said paragraph; and in this behalf the Carrier Members allege and show that the plaintiffs and each of them, to the extent that they, or either, or any of them, represent, either singly or collectively, any persons employed by carriers as yardmasters, are fully able to obtain a fair, adequate and lawful hearing and determination of each and every dispute and claim arising out of the employment of or involving any such yardmaster, which is or may be subject to handling under the provisions of the Railway Labor Act and particularly Section 3 thereof, by presenting and submitting such claim or claims to the Fourth Division, National Railroad Adjustment Board; which said Division, as heretofore alleged, has full and exclusive jurisdiction over such disputes.

Further Answer and Counter-claim.

As a further defense to said complaint and to the alleged cause or causes of action therein, and in support of their counter-claim for the affirmative relief hereinafter demanded, these answering defendants, the said Carrier Members, further allege and show:

XII.

These defendants repeat each and all of the averments, admissions and denials set forth in the foregoing paragraphs Nos. I to XI, inclusive, of this answer.

XIII.

The Fourth Division of the National Railroad Adjustment Board has heretofore duly and regularly exercised
56 its jurisdiction, in accordance with law, and the decree

and mandate of this Court heretofore rendered in this cause identified as Chancery No. 16031, in numerous cases before said Fourth Division, including claims and disputes of yardmasters, and in the exercise of such jurisdiction has duly and regularly received and docketed the submissions of the parties therein, held hearings, and made findings, and rendered awards. Each and all of the members of said Fourth Division have participated in the proceedings in which said awards were rendered. The following is a partial list of the numbers of the awards so rendered by said Fourth Division:

Award No.	Award No.	Award No.	Award No.
16	27	70	94
17	28	71	95
18	53	72	96
22	54	73	97
25	67	74	98
26	69	75	99
			105

Attached hereto, at the indicated pages of the Appendix to this answer, are full, true and correct printed copies of the following awards of said Fourth Division:

Award No. 28—Railroad Yardmasters of North America *vs.* The Detroit Terminal R. R. Co., pp. 410 to 413.

Award No. 54—Railroad Yardmasters of America *vs.* The Pittsburgh & Lake Erie Railroad Co., pp. 414 to 423.

Award No. 67—Railroad Yardmasters of America *vs.* Louisville & Nashville R. R. Co., pp. 424 to 431.

Award No. 86—The American Railway Supervisors' Association, Inc. *vs.* Chicago and North Western Rwy., pp. 432 to 447.

These answering defendants, the Carrier Members, by this reference, adopt the statements in the carriers' respective submissions set forth in the above awards. Said awards are typical and representative of the awards which have been rendered by said Fourth Division within its sole jurisdiction of yardmaster cases and for that reason are attached to this answer.

Wherefore, these answering defendants, the Carrier
57 Members aforesaid, pray that this Court do adjudge and decree:

(1) That yardmasters, by reason of the character of their duties and the responsibilities imposed upon them, for many years past have been and now are generally

known in the railroad industry as "subordinate officials", and have been and are properly described and classified as such;

(2) That yardmasters have never been regarded, designated, or classified within the railroad industry as "yard-service employees", and have not been and are not "yard-service employees", within the meaning and intent of paragraph (h) of Section 3 of the Railway Labor Act;

(3) That the First Division of the National Railroad Adjustment Board therefore has no jurisdiction to hear, consider or determine disputes involving yardmasters, or arising out of their duties, conditions, and circumstances of employment;

(4) That exclusive jurisdiction of such disputes involving yardmasters is vested in the Fourth Division of the National Railroad Adjustment Board;

(5) That the decree heretofore made and entered by this Court in Chancery No. 16031 is valid and binding; and must and should be so regarded by said First Division, and by each and all of the members thereof;

(6) For such other and further relief as may be proper in the premises.

Sydney R. Prince, Jr.,
1728 Consumers Building,
Chicago, Illinois,
Attorney for defendants E. W. Fowler, R. A. Knoff, L. O. Murdock, L. L. McDonald and T. K. Faherty.

Sidney C. Murray,
Chicago, Illinois.
Of Counsel.

This certifies that I have this 9th day of February,
58 1942, served a copy of this answer upon Everett L. Gordon, Attorney for the Plaintiffs, and Leo J. Hassenauer, Attorney for Defendants F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis; and likewise upon Messrs. Poppenhusen, Johnston, Thompson & Raymond, appearing for the Railroad Yardmasters of America seeking to intervene herein, by leaving copy thereof at their respective offices.

Sydney R. Prince, Jr.,
Attorney for Defendants E. W. Fowler, R. A. Knoff, T. K. Flaherty, L. O. Murdock and L. L. McDonald.

60a And on the same day, to wit, the 10th day of October, 1944, there were filed in the Clerk's office of said Court certain Labor Members' Exhibits A and B, in words and figures following, to wit:

61 LABOR MEMBERS' EXHIBIT "A".

(Filed Oct. 10, 1944, Roy H. Johnson, Clerk.)

Rules and Rates of Pay of Yardmen
Brotherhood Railroad Trainmen.
Chicago Switching District

The Chicago Memorandum of Agreement.

62 Memorandum of Agreement between Brotherhood of Railroad Trainmen and General Managers' Committee representing the following named railroads:

Atchison, Topeka & Santa Fe Railroad.
Baltimore & Ohio Railroad.
Chesapeake & Ohio Railroad of Indiana.
Chicago & Alton Railroad.
Chicago & Western Indiana Railroad.
Chicago & Northwestern Railroad.
Chicago, Burlington & Quincy Railroad.
Chicago Junction Railroad.
Chicago, Milwaukee & St. Paul Railroad.
Chicago, Indianapolis & Louisville Railroad.
Chicago & Erie Railroad.
Indiana Harbor Belt Railroad.
Illinois Central Railroad.
New York Central Railroad.
New York, Chicago & St. Louis Railroad.
Pittsburgh, Cincinnati, Chicago & St. Louis Railroad.
Pittsburgh, Fort Wayne & Chicago Railroad.
The Belt Railroad of Chicago.
Wabash Railroad.

The following Rates of Pay, Rules and Regulations will apply to yardmen and switchtenders in the Chicago Switching District, and shall be transmitted to the railroads represented, to be incorporated in their individual schedules:

63 Article X.

Yardmen.

(b) The right to preference of work and of promotion will be governed by seniority in service. The yardmen oldest in service will be given the preference, if competent.

(c) In the appointment of Yardmasters and Assistant Yardmasters the senior yardmen will, in all cases, be given full and unprejudiced consideration.

* * * * * *

Article XXVI.

Life of This Agreement.

The Rules and Rates of Pay herein agreed upon shall remain in effect until revised or abrogated, of which intention thirty days' notice shall be given by the party desiring the change.

Rates of pay effective January 1, 1919 (as revised by arbitration agreements, Eastern and Western Territory, effective December 1st, 1926, and March 1st, 1927, respectively).

Changes in rules due to Supplement 16 to General Order No. 27 effective April 10, 1919.

All other rules effective January 2, 1920.

Signed at Chicago, Illinois, December 20, 1919.

For the Railroads:

Signed

A. P. Titus, *Chairman*
E. L. Johnson
W. S. Cooper
W. E. Schaff
W. H. Scriven
W. J. O'Brien
G. B. Vilas
J. J. Pelley
G. J. Schreeve

For the B. R. T.:

Signed

A. F. Whitney,
Vice President, B. R. T.
H. R. Sauer,
Chairman, Chicago Association, B. R. T.
H. P. Gallagher,
Vice Chairman, Chicago Association, B. R. T.
W. W. McKirchy,
Secretary, Chicago Association, B. R. T.

64 LABOR MEMBERS' EXHIBIT "B".

(Filed Oct. 10, 1944, Roy H. Johnson, Clerk.)

Chicago North Western Line.
Chicago and North Western Railway Company.

Agreement

Between

Chicago and North Western Railway Company

and

Brotherhood of Railroad Trainmen

Effective August 21, 1935.

Rule 12. (b) The right to preference of work and promotion will be governed by seniority in service. The yardmen oldest in service will be given the preference, if competent.

(c) In the appointment of yardmasters and assistant yardmasters the senior yardmen will, in all cases, be given full and unprejudiced consideration. Yardmen appointed to position of yardmaster or assistant yardmaster in their seniority district will not forfeit seniority as yardmen while so assigned.

For the Employees:

E. O. Dugan,
Chairman, General Committee—Brotherhood of Railroad Trainmen.

O. G. Jones,
Secretary, General Committee—Brotherhood of Railroad Trainmen.

For the Railway Company:

M. E. Pangle,
Asst. to President.

67 And on the same day, to wit, on the 9th day of February, 1942, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

68 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—3788) * *

ORDER.

This cause coming on to be heard on the petition and motion of Railroad Yardmasters of America for leave to intervene as a party defendant, and the Court having heard the arguments of counsel and being fully advised in the premises, Finds that due notice of the presentation of said petition and motion together with service of the answer and counterclaim of said petitioner having been given and served upon all parties in interest;

It is Ordered that leave be, and it hereby is given the Railroad Yardmasters of America to intervene as a party defendant and to file instanter herein its answer and counterclaim.

Enter:

Charles E. Woodward
Judge.

Dated, February 9, 1942.

69 And on the same day, to wit, the 9th day of February, 1942, came the Railroad Yardmasters of America by its attorneys and filed in the Clerk's office of said Court its certain Answer and Counterclaim, in words and figures following, to wit:

70 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—3788) * *

ANSWER AND COUNTERCLAIM OF THE RAILROAD YARDMASTERS OF AMERICA.

For answer to the complaint or petition for declaratory judgment, the Railroad Yardmasters of America, defendant, denies every allegation of the complaint except as herein admitted, and alleges as follows:

1. That this defendant admits the allegations of paragraph 1 of the complaint except that it denies that the action is brought on behalf of, or that plaintiffs are representative of all the members of plaintiff organizations for the purpose of this suit, or that plaintiffs do or can maintain the complaint on behalf of others who may be similarly situated who are not members of said plaintiff organizations.

2. The defendant admits the allegations in the first subparagraph of paragraph 2 of the complaint, but denies that the classes of employees enumerated in the Railway Labor Act, over whose disputes jurisdiction is by said Act given to the said First Division, was intended to or did classify said enumerated types or classes of employees as train and yard service employees to include yardmasters.

Defendant admits that the defendants F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis are selected and designated for membership on said Division by Railway Labor Organizations which are national in scope, but alleges that said defendants are respectively members and national officers of, and are

71 chosen for membership on said Division by the Order of Railway Conductors of America, Brotherhood of Railroad Trainmen, Switchmen's Union of North America, Brotherhood of Locomotive Engineers, and the Brotherhood of Locomotive Firemen and Enginemen.

3. Defendant admits the allegations of paragraph 3

except that it denies that the action is instituted pursuant to the provisions of the Railway Labor Act as alleged, and denies that said complaint is or could be properly instituted under 28 U. S. C. A. section 400 (1), the Declaratory Judgments Act, for the reasons hereinafter set forth.

4. Defendant denies that V. E. Benjamin and M. L. Nagle, alleged to be yardmasters, are or could be, as alleged, otherwise known as yard service employees, and alleges that the said term "yard service employees" is a term of well established meaning and general usage on railroads, and in general usage there and in the Railway Labor Act its meaning is exclusive of those persons employed by carriers as, and performing the duties of, yardmasters.

Defendant has no knowledge of the remaining allegations in said paragraph 4 and therefore denies said allegations.

5. Defendant denies that W. W. May, alleged to be an assistant yardmaster, is or could be, as alleged, otherwise known as a yard service employee, and alleges that the said term "yard service employee" is a term of well established meaning and general usage on railroads, and in general usage there and in the Railway Labor Act its meaning is exclusive of those persons employed by carriers as, and performing the duties of, assistant yardmasters.

Defendant has no knowledge of the remaining allegations in said paragraph 5 and therefore denies said allegations.

6. Defendant admits the allegations of paragraph 6, but alleges that by reason of the fact that jurisdiction of disputes involving yardmasters is not given to the First, Second, or Third Divisions of said Board, the Fourth Division has such jurisdiction.

7. This defendant has no knowledge of the facts alleged in the first subparagraph of paragraph 7 of the complaint, and therefore denies said allegations.

Defendant admits that it appears from said Exhibit "C" to the complaint that the carrier members of the First Division referred to a decree entered by this court, in chancery, Cause No. 16031, wherein the Fourth Division of the National Railroad Adjustment Board was directed and commanded to take jurisdiction of disputes of yardmasters there involved, and to render awards thereon. Defendant denies the legal conclusion contained in said paragraph 7 of the complaint that said decree and its terms and provisions apply only to the particular disputes there involved, but alleges that said decree was an adjudication in rem

adjudicating the fact that jurisdiction over disputes involving yardmasters was not by said Railway Labor Act given to the First, Second, or Third Division of the National Railroad Adjustment Board, and that thereby jurisdiction over all such disputes was by said Act given to the Fourth Division.

Defendant denies that the defendants, members of the First Division, have never regarded said decree as having binding effect upon or command to the members of the First Division, but alleges that as shown by said Exhibit "C" to the complaint, the carrier members of said Division expressly recognized the validity, effect and full force of said decree as adjudicating that exclusive jurisdiction of disputes involving yardmasters was by said Act given to the Fourth Division; defendant further alleges that the labor members of said First Division, the plaintiffs, and the other officers of said plaintiff organizations have likewise recognized the full force and effect of said adjudication in this court, in Cause No. 16031, and that upon petition of said Order of Railway Conductors there was heretofore referred to the Fourth Division of said National Railroad Adjustment Board the same claim of V. E. Benjamin
73 and M. L. Nagle for loss of earnings by reason of reduction of force at Kelly Lake, Minnesota, being the same V. E. Benjamin and M. L. Nagle alleged to have subsequently asserted the same identical claim in Docket 6404, referred to in paragraph 7 of the complaint; that in said claim so submitted said Fourth Division in Docket No. 23, and by award No. 22, said Fourth Division on September 12, 1938, entered a final award finding that said Division had jurisdiction of the dispute and granting petitioner's request that the same be withdrawn.

8. Defendant denies the allegations of paragraph 8, and denies the legal conclusion that referees in the proceedings before said First Division referred to in said paragraph 8 of the complaint could or did sustain the jurisdiction of the First Division over disputes involving yardmasters, for the reason that the only one of said disputes or dockets set forth in Exhibits "D", "E", "F" and "G" to the complaint which was a dispute involving a yardmaster, was Docket 4504, said Exhibit "G", and as appears from said exhibit the award therein was entered on March 31, 1938, prior to the entry of the decree in this court in said cause No. 16031; defendant alleges further that in said disputes

referred to in paragraph 8 of the complaint, the defendant is informed and believes and upon such information and belief alleges the fact to be that the point of lack of jurisdiction of the First Division over yardmasters' cases was not in those dockets raised or brought to the said Division's attention by the respondent in said disputes; and defendant alleges further that no referee's decision as to jurisdiction would confer jurisdiction on said First Division in excess of the jurisdiction as limited by and outlined in the Railway Labor Act.

9. Defendant admits the allegation contained in the first sentence of paragraph 9, except that it denies that the said First Division has jurisdiction of disputes involving yard clerks, car inspectors and helpers, and track maintenance forces, the work of whom is alleged in said paragraph 9 of the complaint to be supervised by yardmasters.

Defendant denies that the duties of yardmasters are as alleged in said paragraph in cooperation and operation with the duties performed by employees in train, engine and yard service, and alleges that the duties of yardmasters do not include operation, cooperation, partial cooperation or performance, or assistance in the duties performed by employees engaged in train, engine and yard service, but the said duties performed by yardmasters consist exclusively of supervision of the work of said classes of employees, and are distinct from and different from the duties performed by yard service employees. Defendant alleges that the term "yard service" has in railroad terminology a distinct and well established meaning, and yardmasters do not perform the duties of, nor are they classified by the terms of section 3 (h) of the Railway Labor Act as yard service employees.

10. Defendant denies the allegations of paragraph 10. Defendant alleges that plaintiffs do have a plain and adequate remedy at law. Defendant alleges that plaintiffs may obtain hearing and determination of the said disputes referred to in the complaint by submission of said complaints to the Fourth Division of said Board, which said Fourth Division has exclusive jurisdiction to hear and determine disputes involving yardmasters, since by the terms of said Act jurisdiction to hear such disputes is not given to any other Division of the Board.

11. Defendant denies the allegations contained in paragraph 11 of the complaint, and denies that plaintiffs, or either of them, are entitled to any of the relief prayed.

Affirmative Defenses.

And for its further and affirmative defenses, defendant alleges and shows that:

1. The Fourth Division of said National Railroad Adjustment Board and the individual members thereof, as well as the respondents in the two said dockets now
75 alleged to be pending, viz.; the Great Northern Railway Company, a corporation, and the Southern Pacific Company (Pacific Lines), a corporation, are necessary parties defendant who have not been joined as parties defendant.

2. That the said V. E. Benjamin, M. L. Nagle and W. W. May, alleged in paragraphs 4 and 5 of said complaint to be the claimants against said carriers, are necessary parties plaintiff who have not been joined as plaintiffs.

3. Said complaint is fatally defective in that, although it purports to be a representative or class action on behalf of persons not made parties, no facts are alleged which show the identity, number, residence, interest, or type of claim of said persons, or the source, amount, or identity of interest with plaintiffs on the part of the said persons in behalf of whom the declaratory judgment is sought.

5. No facts are alleged in the complaint to support the further legal conclusion contained in paragraph 10 "that plaintiffs have no adequate remedy at law as against
76 the said Acts of the First Division which have been and are being committed * * *." It appears from the complaint and from the exhibits thereto, and particularly from Exhibits "A" and "B", that the claims of the said V. E. Benjamin, M. L. Nagle and W. W. May are based upon contract rights for which they have adequate remedy in United States courts or in State courts of general jurisdiction, the provisions of said Railway Labor Act for the hearing of such disputes by the National Railroad Adjustment Board not being an exclusive remedy.

6. No facts are alleged to support the further legal conclusion contained in said paragraph 10 "that the plaintiffs, and the members thereof, will suffer great and irreparable injury if said relief shall be refused."

7. That it appears on the face of the complaint that the plaintiffs, The Order of Railway Conductors of America, and the Brotherhood of Railroad Trainmen do not have any direct interest, legal, equitable or otherwise, in the said disputes pending before the said First Division, but as ap-

pears from paragraphs 4 and 5 of the complaint the claims of the individuals who do have such direct interest against the carriers were merely represented by the said plaintiffs in the filing and presentation of said disputes to the National Railroad Adjustment Board, and as appears from Exhibit "A", the claimants against the Great Northern Railway Company are V. E. Benjamin and M. L. Nagle, and their claims are based upon an agreement between said carrier and the Great Northern Yardmasters Association; that, as appears from Exhibit "B", the claimant in the dispute against the Southern Pacific Company, alleged to be pending before said First Division is W. W. May, and that his claim is alleged to be based upon Articles 3 and 9 of an agreement between the carrier and the Railroad Yardmasters of America, and that the plaintiff Brotherhood of Railroad Trainmen has no direct legal or equitable interest in said dispute or said agreement.

77 8. That no facts are alleged to support the legal conclusion contained in paragraph 10 of the complaint that the National Mediation Board "in appointing referees to sit with the First Division members thereof, in disputes involving yardmasters, caused to be definitely established in said First Division jurisdiction to hear, determine and render awards involving disputes of yardmasters as yard-service employees * * *", but by the terms of said Railway Labor Act, and particularly § 3 (h) and § 5, it appears that the National Mediation Board and the members thereof have no legal power definitely to establish or to confer upon the First or any other division jurisdiction of any kind, the jurisdiction of each of said divisions of the National Railroad Adjustment Board being limited and defined by the Railway Labor Act.

78 10. The complaint, and particularly paragraphs 6 and 7, discloses that plaintiffs are primarily attempting to procure, under the guise of a declaratory judgment, an adjudication that the only division of the National Railroad Adjustment Board which has jurisdiction of yardmasters' disputes, is that division, the labor members of which are appointed and controlled by the plaintiffs; and that the prayer or demand for relief, subdivision 3, by which the court is asked to adjudicate that the First Division is not bound by the provisions of the decree of this court, in chancery, No. 16031, is a collateral attack upon a valid and binding adjudication, which collateral attack is being made

as the complaint discloses by voluntary unincorporated associations who have no direct legal interest in the subject matter of said decree, nor in the relief now sought by declaratory judgment, and no allegation is made that any individual members of said plaintiff organizations or persons eligible to membership therein are yardmasters or claimants in pending disputes who do have such direct legal interest in a justiciable controversy such as is embraced within the terms of the Declaratory Judgments Act.

11. This court has no power, and it would be inappropriate, to grant a declaration, as prayed in paragraph 3 of the prayer for relief, that the First Division of the National Railroad Adjustment Board is not bound by the provisions of the decree entered by this court in chancery case No. 16031, for the reason that the limits and effect of that decree are defined exclusively by the pleadings there and the decree based thereon; that this court cannot by declaratory judgment procedure review its prior judgments.

79 13. The facts alleged in the petition for declaratory judgment fail to show that there exists between plaintiffs and defendants at the present time an actual justiciable controversy; said petition likewise shows on its face that granting the relief prayed would not terminate any uncertainty as to the jurisdiction between respective divisions of the National Railroad Adjustment Board.

14. The supposed controversy with respect to which a declaration is sought and the jurisdiction of yardmasters' cases among the divisions of the National Railroad Adjustment Board has been adjudicated by this court in chancery case No. 16031, entitled "Railroad Yardmasters of America, et al. *vs.* National Railroad Adjustment Board, Fourth Division, et al." and the decree therein which is attached hereto and made a part hereof as Exhibit "A" is res adjudicata of the issues raised and of the rights sought to be declared by the petition for declaratory judgment herein.

Counterclaim for Declaratory Judgment.

And for its counterclaim against the plaintiffs, as well as against the original defendants herein, the Railroad Yardmasters of America alleges that:

1. The Railroad Yardmasters of America is a voluntary unincorporated association, and is a standard labor organi-

zation, national in scope, whose members are persons engaged in the service of carriers by rail in the capacity of yardmasters; that at the present time the said Railroad Yardmasters of America has collective bargaining agreements in full force and effect on more than twenty-five rail carriers in the United States covering in excess of 97,000 miles of railroad properties, representing in excess of fifty-four per cent (54%) of the total mileage of rail carriers of the United States on which persons employed thereby as yardmasters are represented by labor organizations having in effect collective bargaining agreements on behalf of yardmasters.

2. By the terms of the Railway Labor Act as amended by Act of Congress June 21, 1934 (45 U. S. C. A. Section 153 (3)) there is created a quasi-judicial or administrative Federal Board known as the National Railroad Adjustment Board, and by said Act it is further provided:

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

'First division: To have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

'Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

'Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by

the carriers and five by the national labor organizations of employees.

'Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.' ''

81 3. That yardmasters, and persons employed by rail carriers as or performing the duties of yardmasters, are not included in any of the classes of employees over whose disputes jurisdiction is by said Act given to the First, Second, or Third Divisions, respectively, of said National Railroad Adjustment Board.

4. The counterclaimant has heretofore presented and referred to the Fourth Division of the National Railroad Adjustment Board, for and on behalf of yardmasters whom it represented, numerous disputes against railroad carriers; that it will in the future, in its capacity as representative of its individual members who are yardmasters as aforesaid, have occasion to bring and refer to said Division other and further of said disputes which are now in process of attempted settlement by negotiation on the respective railroad properties. Said counterclaimant has heretofore appeared as plaintiff in that certain chancery proceeding, No. 16031, in this court, entitled "United States ex rel. Railroad Yardmasters of America, et al. *vs.* National Railroad Adjustment Board, Fourth Division, et al." and procured the entry of a decree therein, copy of which is attached hereto and made a part hereof as Exhibit "A", in and by the terms of which it was adjudicated that the Fourth Division of said Board has jurisdiction of disputes involving yardmasters, arising between carriers by rail and their employees or groups of employees growing out of the interpretation of agreements as to wages, rates of pay, and working conditions.

5. The said Fourth Division is now and has been since the entry of said decree on July 11, 1938, receiving, docketing, hearing, and entering awards in disputes referred to said Division by this counterclaimant and other representatives of yardmasters, as by the terms of the said Railway Labor Act said Division is required to do.

82 6. The original defendants herein are members of the First Division of said National Railroad Adjustment Board, an administrative or quasi-judicial body created by the Railway Labor Act as amended June 21, 1934, 45 U. S. C. A. 151-163; the said Board and the First Division thereof maintains its headquarters and holds its meetings and hearings in the City of Chicago, State of Illinois, Northern District.

7. Defendants are, and at all of the times mentioned herein were, the duly appointed, qualified and acting members of the First Division of said National Railroad Adjustment Board, and as such members hold their appointments and exercise their functions under and by virtue of the Act of Congress aforesaid, the Railway Labor Act; and are the regular members of said Division appointed and acting as such.

8. Counterclaimant brings this counterclaim for itself and on behalf of its individual members, who are employed as or perform the services of yardmasters, and on behalf of all other persons who are similarly employed who are not members of the Railroad Yardmasters of America.

Wherefore, counterclaimant prays that this court by declaratory judgment declare and adjudge that the Fourth Division of the National Railroad Adjustment Board has sole and exclusive jurisdiction to hear, docket, entertain and enter awards in disputes involving yardmasters which have heretofore been referred to said Board under the terms of the Railway Labor Act and remain undetermined, and which may hereafter be referred to said National Railroad Adjustment Board.

Railroad Yardmasters of America,
Defendant,
By C. H. Burchfield.

Anan Raymond,
Robert Z. Hickman,
Attys. for Railroad Yardmasters of America,
11 S. La Salle St.

83 State of Illinois, } ss.
County of Cook. }

C. H. Burchfield, being first duly sworn, upon his oath deposes and says that he is the President of the Railroad Yardmasters of America, and that he has read the above and foregoing answer by him subscribed on behalf of, and for said Railroad Yardmasters of America; that he is fully authorized to make this verification on behalf of said Railroad Yardmasters of America, and that he has personal knowledge of the facts and things set forth in said answer and that the allegations contained therein are true.

C. H. Burchfield.

Subscribed and Sworn to before me this 30th day of January, A. D. 1942.

M. E. Borkenhagen,
(Seal) *Notary Public.*

84 EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—16031) * *

FINAL DECREE AND INJUNCTION

This cause coming on to be heard on this date upon the original petition of the petitioners, the joint and several answer of respondents E. J. Hamner, Charles P. Neill and E. Murrin, and on motion of petitioners that the said petition be taken as confessed as against the other respondents herein, and after hearing evidence herein and argument of counsel, and being fully advised in the premises, the court finds:

1. That the individual respondents constitute the Fourth Division of the National Railroad Adjustment Board, established and created by the laws of the United States, 45 U.S.C.A. Section 153 (3), and that they are presently the duly constituted, qualified and acting members of said Fourth Division.

85 2. That the said National Railroad Adjustment Board, so created and established, and the said Fourth Division thereof, have and maintain headquarters and

conduct their hearings in the City of Chicago, State of Illinois.

3. That the petitioners, R. V. Murphy, J. Besant and E. E. Wheeler, are and were at all of the times mentioned in the original petition members of the Railroad Yardmasters of America, which was and is a national labor organization of the employees of carriers as the term is used in the Railway Labor Act (45 U.S.C.A. Section 153 (3)), and were employed as yardmasters by the Southern Pacific Company (Pacific System), a railroad carrier engaged in interstate commerce, and were so employed at all of the times mentioned in the original petition herein.

4. That in and by the terms of said Railway Labor Act, 45 U.S.C.A. Section 153, it is provided:

"'(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

'First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

'Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

86 'Third division: To have jurisdiction over disputes involving station, tower and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

'Fourth division: To have jurisdiction over disputes

involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.' "

5. That yardmasters are not included in any of the classes of employees over whose disputes jurisdiction is by said Act given to the First, Second or Third Divisions, respectively, of said National Railroad Adjustment Board, nor do either of said last mentioned divisions of said Board have jurisdiction of disputes arising out of their employment in which yardmasters are involved.

6. That on March 21, 1938, the petitioner, Railroad Yardmasters of America, acting for and on behalf of the said petitioners, R. V. Murphy, J. Besant and E. E. Wheeler, filed with the said Fourth Division of the National Railroad Adjustment Board an *ex parte* submission of disputes which had theretofore arisen between said respective individual petitioners and said carrier by whom they were employed as yardmasters; copies of which said *ex parte* submissions and statements of grievances are attached to the original petition herein and by reference thereto are made a part hereof as fully as if set out here verbatim.

7. That thereafter, on March 24, 1938, the said Fourth Division of the National Railroad Adjustment Board
87 failed and refused to hear and adjudicate the said three *ex parte* submissions or cases and with respect thereto adopted and entered of record in their proceedings a memorandum or resolution stating that the said Fourth Division had deadlocked on the question of assuming jurisdiction to receive and hear the said cases or disputes.

8. That the said Fourth Division of the National Railroad Adjustment Board had and now has jurisdiction to docket, hear and adjudicate said submissions, cases or disputes, and that on March 21, 1938, it became and was the duty of said Fourth Division and the individual members thereof to docket, hear and adjudicate the said three *ex parte* submissions or disputes.

9. That the National Mediation Board has in the past refused, and now continues to refuse, to appoint a neutral referee to the respective divisions of the National Railroad Adjustment Board upon their failure to render an award

in a dispute submitted to them when such failure or refusal is a failure or refusal to accept, docket and hear a dispute or submission when the said failure or refusal results from a deadlocking on the question of assuming jurisdiction of the parties or subject matter of said submission or dispute; and that particularly, the said National Mediation Board has refused, and continues to refuse to appoint a neutral referee to the said Fourth Division of said National Railroad Adjustment Board; to hear and determine said three *ex parte* disputes lodged with the Fourth Division by the individual petitioners herein as above set forth, and that a request for the appointment of a neutral referee to said Fourth Division by any of the parties to the above mentioned three submissions or disputes is useless and unavailing.

88 10. That the duty and jurisdiction of the said Fourth Division of the National Railroad Adjustment Board, to take jurisdiction of and hear and determine said *ex parte* disputes or submissions, arises under the laws of the United States.

11. That the said E. J. Hamner, Charles P. Neill and E. Murrin have entered their general appearance herein and have filed their joint and several answer to the original petition; that the said R. A. Walton, S. J. Hogan, R. B. Parkhurst, and the Fourth Division of the National Railroad Adjustment Board have each entered their general appearance herein.

12. That after the entry of the respective appearances of the said respondents, there was entered herein on May 9, on motion of Michael L. Igoe, United States District Attorney, and by agreement of the petitioners, an order extending the time for all respondents to plead to the petition, to May 25, 1938; that on May 24, 1938, there was entered herein an order extending the time for all respondents to plead, to and including June 25, 1938, and that such time has now expired with no pleading having been filed, except the answer of the three individual respondents as above set forth.

13. That as to the individual respondents R. A. Walton, S. J. Hogan, R. B. Parkhurst, and National Railroad Adjustment Board, Fourth Division, the original petition herein is taken as confessed for want of any plea, answer or demurrer thereto; and that after the entry of appearances of the other individual respondents, and on June 25,

1938, the time for said respondents to plead to the original petition expired, and that none of said respondents, except the said E. J. Hamner, Charles P. Neill and E. Murrin, have filed any plea, answer or demurrer to the original petition herein, and that as to all of said individual respondents who have entered their appearance and have not filed any plea, answer or demurrer, the said petition is taken as confessed.

89 14. That this Court has jurisdiction of all of the parties hereto and of the subject matter hereof, and that the equities in said cause are with the petitioners.

15. That all the allegations of the original petition are here found as findings of fact, the same as if the said allegations were here set out in full verbatim.

15. The Court finds the petitioners are entitled to the relief as prayed in the original petition and are entitled to the issuance by this Court of a mandatory writ of injunction, directing, ordering and commanding the said Fourth Division of the National Railroad Adjustment Board, and the individual members thereof, to accept, docket, take jurisdiction of, and hear said three *ex parte* submissions or disputes, lodged and filed with the said Fourth Division by the petitioners as above set forth, and to render awards on the merits in each of said disputes.

16. The Court further finds each and every of the above and foregoing as conclusions of law, and the above and foregoing findings of fact and conclusions of law are by reference thereto included in and made a part of this final decree.

It is, therefore, ordered, adjudged and decreed that the Fourth Division of the National Railroad Adjustment Board, C. W. Deal, R. B. Parkhurst, A. J. Hancock, R. A. Walton, Charles P. Neill, E. J. Hamner, S. J. Hogan and E. Murrin, individually, and as members of said Fourth Division of the National Railroad Adjustment Board, and their successors on such division, and their agents, officers, attorneys and servants, be, and they hereby are enjoined and commanded to take jurisdiction of, to docket, hear, determine and enter awards on the merits in the said three *ex parte* submissions or disputes, heretofore filed with

90 said Fourth Division of the National Railroad Adjustment Board, on or about March 21, 1938, by the petitioner Railroad Yardmasters of America, acting for and on behalf of the said R. V. Murphy, J. Besant and E. E.

Wheeler, petitioners, and that the terms of this final decree and injunctional order shall be perpetually in effect.

It is further ordered that the sum of $20.06 taxed herein as the costs of the petitioners, be paid by the said respondents to the petitioners and that they have execution therefor.

Holly,
Judge, District Court.

Entered this 11th day of July, 1938.

91 And afterwards on, to wit, the 24th day of February, 1942, came the Great Northern Railway Company by its attorneys and filed in the Clerk's office of said Court its certain Notice and Answer of Intervener, in words and figures following, to wit:

92 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—3788) * *

NOTICE OF MOTION OF GREAT NORTHERN RAILWAY COMPANY FOR LEAVE TO INTERVENE

To:

V. Craven Shuttleworth, W. H. Endle and Everett L. Gordon, Attorneys for Plaintiffs, 100 West Monroe Street, Chicago, Illinois;

Sydney R. Prince, Jr., Attorney for Defendants E. W. Fowler, T. K. Faherty, R. A. Knoff, L. L. McDonald and L. O. Murdock, 220 South State Street, Chicago, Illinois;

Leo J. Hassenauer, Attorney for Defendants F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis, 105 West Adams Street, Chicago, Illinois;

Poppenhusen, Johnston, Thompson & Raymond, Anan Raymond and Robert Z. Hickman, Attorneys for Interveners Railroad Yardmasters of America, 11 South La Salle Street, Chicago, Illinois;

Please take notice that on Tuesday, February 24, 1942, at the opening of court in the forenoon, or as soon thereafter as counsel can be heard, we shall appear before
93 the Hon. Charles E. Woodward, one of the judges of said court, in the courtroom usually occupied by him

in the United States Court House, Chicago, Illinois, or in his absence before such other judge as may be hearing motions in his stead, and shall present the motion of Great Northern Railway Company, a corporation, for an order permitting it to intervene as a defendant in the above-entitled action and permitting the form of answer, of which a copy is hereto attached, to be the answer of said intervener in this action; at which time and place you may appear if you see fit.

Such motion will be made upon the following grounds:

(1) Applicant is the party against which the claim is asserted in the petition filed with the National Railroad Adjustment Board, First Division, by V. E. Benjamin and M. L. Nagle, which petition is referred to in paragraph 4 of the complaint in this action, and applicant is the Great Northern Railway Company which filed the ex parte submission denying the jurisdiction of said First Division, as stated in said paragraph 4 of the complaint;

(2) Applicant Great Northern Railway Company is entitled to intervene as of right for the reason that it is directly interested in this action and representations of applicant's interest by the defendants may be inadequate and the applicant may be bound by a judgment in this action;

(3) Applicant's claim and defense as herein set forth in the attached form of proposed answer and the main action have questions of law and fact in common;

(4) Applicant's intervention will not unduly, or at all, delay or prejudice the adjudication of the rights of the original parties.

Said motion is based upon all of the records, files and papers in this action, including this notice of motion
94 and the said proposed answer, a copy of which is hereto attached.

Dated this 20th day of February, 1942.

Winston, Strawn & Shaw and
Bryce L. Hamilton,
First National Bank Building,
Chicago, Illinois,
Attorneys for Intervener,
Great Northern Railway Company.

F. G. Dorety,
R. J. Hagman,
1120 Great Northern Building,
St. Paul, Minnesota.
Of Counsel.

Received a copy of the foregoing notice and a copy of the proposed answer of intervener mentioned therein, this 20th day of February, 1942.

V. Craven Shuttleworth,
W. H. Endle,
Everett L. Gordon,
Attorneys for Plaintiffs.
Sydney R. Prince, Jr.,
Attorney for Defendants, E. W. Fowler, et al.
Leo J. Hassenauer,
Attorney for Defendants, F. J. Williams, et al.
Anan Raymond,
Robert Z. Hickman,
Attorneys for Intervening Defendants, Railroad Yardmasters of America.

95 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—3788) * *

ANSWER OF INTERVENER GREAT NORTHERN RAILWAY COMPANY

Intervening Great Northern Railway Company, a corporation, makes the following answer to the complaint of the plaintiffs herein:

I.

Answering paragraph 1 of the complaint, intervener alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last sentence of said paragraph, but admits the allegations contained in the remainder of said paragraph.

II.

Answering paragraph 2 of the complaint, intervener denies that the defendants named in the complaint are
96 permanent members of the First Division of the National Railroad Adjustment Board, but admits the remaining allegations of that paragraph.

III.

Answering paragraph 3 of the complaint, intervener admits that this is a suit of a civil nature for a declaratory judgment, brought pursuant to the Federal Declaratory Judgments Act of 1934 (28 U. S. Code 400), and arising under the Railway Labor Act, as amended (45 U. S. Code 151-163); that there is involved in this suit the construction and interpretation of certain provisions of said Railway Labor Act, and that this Court has jurisdiction of this action and of the parties hereto.

IV.

Answering paragraph 4 of the complaint, intervener admits the filing of a so-called ex parte submission by the Order of Railway Conductors of America against the Great Northern Railway Company with the First Division of the National Railroad Adjustment Board, and admits that the Great Northern Railway Company in the said Docket No. 6404 protested the hearing or rendition of any award in said dispute on the ground that jurisdiction over the said dispute was not vested in the First Division. Intervener denies that V. E. Benjamin and M. L. Nagle, yardmasters, are "otherwise known as yard-service employees," and avers to the contrary that when acting as yardmasters they are subordinate officials exercising managerial functions. Intervener admits that the Carrier Members of the First Division declined to agree to set said dispute for hearing, and admits that Exhibit "A" annexed to the complaint is a copy of the ex parte submission filed with the First Division on behalf of said yardmasters but denies that the statements therein are true and correct, except as otherwise herein admitted.
97 Intervener denies all other allegations of paragraph 4 of the complaint.

V.

Answering paragraph 5 of the complaint, intervener alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, except that it admits that such a proceeding as is referred to therein was begun before the First Division of the National Railroad Adjustment Board and that the Southern Pacific Company pro-

tested the jurisdiction of the First Division in connection therewith.

VI.

Answering paragraph 6 of the complaint, intervener alleges that the Fourth Division of the said National Railroad Adjustment Board, created under Section 3, First (h) of the said Railway Labor Act, is composed of six members, three of whom are selected by the carriers and the other three by national labor organizations of the employees. The labor organization and the members selected by them holding office from time to time on the Fourth Division have been and are as follows:

The National Marine Engineers' Beneficial Association selected Charles M. Sheplar, who was succeeded March 25, 1935, by William S. Brown, who in turn was succeeded April 2, 1937, by S. J. Hogan, who on March 31, 1941, was succeeded by the present incumbent, J. H. Blake; and the International Longshoremen's Association selected J. J. Noonan, who on March 14, 1936, was succeeded by R. A. Walton; and the Inland-boatment's Union of the Pacific selected C. W. Deal, who on March 31, 1941, was succeeded by J. M. Fox.

Intervener admits that the Fourth Division has the jurisdiction specified in Second 3, First (h) of the
98 Railway Labor Act. All other allegations of said paragraph 6, not otherwise expressly admitted, are denied by intervener.

VII.

Answering paragraph 7 of the complaint, intervener admits that on August 28, 1941, the Carrier Members of the First Division of the National Railroad Adjustment Board addressed to the Labor Members of the said First Division a communication, of which Exhibit "C" referred to in said paragraph 7 of the complaint is a copy, in which the said Carrier Members advised the Labor Members that they would not participate in any consideration of the merits in nine specified dockets, among which were Dockets Nos. 6404 and 12295, and in which they made other statements as set forth in said Exhibit "C." Intervener admits that the Carrier Members of the First Division declined to agree to set said Dockets Nos. 6404 and 12295 for hearing and to enter awards thereon.

Intervener denies each and all of the allegations of the second and third paragraphs of said paragraph 7 of the complaint in which the plaintiffs set out their legal conclusions respecting the decree entered by this Court in Chancery Docket No. 16031.

VIII.

Answering paragraph 8 of the complaint, intervener admits that, substantially as alleged in said paragraph, said First Division undertook to exercise jurisdiction over and to render awards upon the disputes referred to in said paragraph, and that the several exhibits "D," "E," "F" and "G" annexed to said complaint are copies of said awards; but intervener alleges that no question as to
99 the jurisdiction of the said First Division to consider, or hear, or determine said disputes was raised by any of the respective carriers respondent in said proceeding.

IX.

Answering paragraph 9 of the complaint, intervener denies each and all of the allegations thereof, except Intervener admits that the duties of yardmasters, employed exclusively by rail carriers, include directing the work of the several classes of employees employed in a rail carrier yard, including engine crews, foremen, conductors, helpers, brakemen, engineers and firemen, switchtenders, yard clerks, car inspectors and helpers, track maintenance forces, road train and engine crews in train movement to and from rail yard and hostlers and helpers in movement of light engines to and from said rail yard, but such direction is not exercised solely by yardmasters.

Intervener alleges that in the performance of their duties railroad yardmasters have charge of yards and are responsible for conditions within such yards; that trains and engines, and all employees in train, engine, or yard-service in yards are subject to their direction and control; that they are required to see that employees within yards are in condition for the proper discharge of their duties; that all persons employed in yard-service within such yards are subject to their instructions; that they are responsible for the proper makeup and movement of trains through yards, the prompt and proper handling of cars, and fulfillment of all requirements as

to the movement, handling and protection of cars and of the freight contained therein. In the discharge of their duties yardmasters necessarily exercise a substantial measure of individual initiative and responsibility. They
100 form, and in general railroad practice, have been recognized as forming, a distinct class of employees; and because of their responsibilities and the character of supervision and direction which they are required to and do exercise, all as above described, they have been classed and are generally referred to and designated as "subordinate officials," and are not and never have been classed or described or regarded as "yard-service employees" within the established meaning of that term as understood and employed in the railroad industry, or as the same appears in Section 3 (h) of the Railway Labor Act.

X.

Answering paragraph 10 of the complaint, intervener admits that, substantially as alleged in said paragraph 10, no further remedy or relief can be obtained from the defendants, the ten members of the First Division of the National Railroad Adjustment Board, toward the hearing and determination by said First Division of disputes involving yardmasters and arising out of the service of yardmasters as employees of carriers; but the intervener denies each and every other allegation of said paragraph 10, and denies in particular that said plaintiffs have pursued, undertaken, or exhausted any remedy or remedies available to them, under the Railway Labor Act or otherwise, for the purpose of obtaining the hearing and determination of disputes involving yardmasters, as aforesaid, by the Fourth Division of said Board. In this behalf intervener alleges that exclusive jurisdiction to hear and determine such disputes is by law vested and resides in said Fourth Division.

101 Answering paragraph 11 of the complaint, intervener denies each and every allegation thereof; and in this behalf alleges that the plaintiffs and each of them, to the extent that they, or either, or any of them, represent, either singly or collectively, any persons employed by carriers as yardmasters, are fully able to obtain a fair, adequate and lawful hearing and determination of each and every dispute and claim arising out of the employment of or involving any such yardmaster, which is or may be

subject to handling under the provisions of the Railway Labor Act and particularly Section 3 thereof, by presenting and submitting such claim or claims to the Fourth Division, National Railroad Adjustment Board; which said Division, as heretofore alleged, has full and exclusive jurisdiction over such disputes.

Wherefore, intervener prays:

(1) That the relief prayed for in the complaint be denied;

(2) That the Court declare that the exclusive jurisdiction of such disputes involving yardmasters as are mentioned in the complaint is vested in the Fourth Division of the National Railroad Adjustment Board; and

(3) That intervener be granted such other and further relief as may be proper in the premises.

Winston, Strawn & Shaw and
Bryce L. Hamilton,
First National Bank Building,
Chicago, Illinois,
Attorneys for Intervener, Great Northern Railway Company.

F. G. Dorety,
R. J. Hagman,
1120 Great Northern Building,
St. Paul, Minnesota.
Of Counsel.

102 And afterwards, to wit, on the 9th day of March, 1942, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

103 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—3788) * *

ORDER

This cause coming on to be heard on the motion of Great Northern Railway Company for an order permitting it to intervene as a defendant herein, and the Court having heard the arguments of counsel, and being fully advised in the premises, finds that said motion should be granted;

It is Therefore Ordered that Great Northern Railway Company be, and it is, hereby given leave to intervene as a party defendant in the cause, and that the answer of Great Northern Railway Company accompanying its Notice of Motion for leave to intervene shall stand as its answer in this cause.

Enter: Charles E. Woodward:
March 9, 1942. *U. S. District Judge.*

104 And on the same day, to wit, on the 9th day of March, 1942, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

105 In the District Court of the United States
* * (Caption—3788) * *

ORDER

This cause coming on for hearing on the motion of the Southern Pacific Company for leave to intervene as a defendant therein and for leave to file its answer instanter, and the Court being fully advised in the premises:

It Is Ordered that the Southern Pacific Company be, and is hereby, granted leave to intervene in this cause and is granted further leave to file its answer therein instanter.

Enter: Charles E. Woodward,
Judge.

Dated: Chicago, Illinois,
March 9th, 1942.

106 And afterwards on, to with, the 11th day of March, 1942, came the Intervener, Southern Pacific Company by its attorneys and filed in the Clerk's office of said Court its certain Notice of Motion for Leave to Intervene and Answer of Intervener, in words and figures following, to wit:

107 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—3788) * *

NOTICE OF MOTION FOR LEAVE TO INTERVENE.

To the above-named plaintiffs and to their attorneys, V. Craven Shuttleworth, W. H. Endle and Everett L. Gordon:

To the defendants, E. W. Fowler, T. K. Faherty, R. A. Knoff, L. L. McDonald and L. O. Murdock, and to their attorney, Sydney R. Prince, Jr.:

To the defendants, F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis, and to their attorney, Leo J. Hassenauer:

Please Take Notice that on Monday, February 16th, 1942, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, the Southern Pacific Company, a corporation, will appear before His Honor, Judge Charles E. Woodward, in the court room usually occupied by him in the Federal Building, Chicago, Illinois, and move the court 108 for an order permitting it to intervene as a defendant in the above entitled action and permitting the form attached hereto, and made a part hereof, to be the answer of the said intervener in said action.

Said motion will be made upon the following grounds:

1. Applicant is entitled to intervene as of right for the reason that it is directly interested in this action and that the representation of applicant's interest by the defendants may be inadequate and applicant may be bound by the judgment in said action;

2a. Applicant's claims and defenses herein as set forth in the attached form of answer, and the main action have questions of law and fact in common;

2b. Applicant's intervention will not unduly or at all delay or prejudice the right of the original parties.

Said motion will be based upon all of the records, files and papers in this suit, including this notice of motion and the said form of answer attached hereto.

Dated: February 14th, 1942.

John A. Sheean,
208 South LaSalle Street,
Chicago, Illinois,
Attorney for Southern Pacific Company, a corporation, Applicant.

Henley C. Booth,
Burton Mason,
65 Market Street,
San Francisco, California,
Of Counsel.

Received a copy of the foregoing Notice of Motion, 109 together with copy of the proposed Answer in Intervention, this 14th day of February, 1942.

V. Craven Shuttleworth,
W. H. Endle,
By E. L. Gordon, *of Counsel,*
Attorneys for Plaintiffs.

Sydney R. Prince, Jr.,
Attorney for Defendants E. W. Fowler, T. K. Faherty, R. A. Knoff, L. L. McDonald and L. O. Murdock.

Leo J. Hassenauer,
Attorney for Defendants, F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis.

110 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—3788) * *

ANSWER OF INTERVENER.

The above-named intervener, Southern Pacific Company, a corporation, by leave of the Court first obtained, files its answer as follows to the plaintiffs' complaint herein:

First Defense.

For a first defense to said complaint, and to the alleged cause or causes of action therein, intervener admits, alleges and denies as follows:

I.

Intervener denies each and all of the allegations of that portion of paragraph 1 of said complaint commencing with the words "The plaintiffs bring" (line 16, page 2, of the complaint) and ending with the words "organization or not" (line 21 of said page 2). Intervener admits the 111 allegations of the remainder of said paragraph 1.

II.

Intervener admits the allegations of paragraph 2 of said complaint.

III.

Answering paragraph 3 of the complaint, intervener admits that this is a suit of a civil nature for a declaratory judgment, brought pursuant to the Federal Declaratory Judgments Act of 1934 (28 U. S. Code 400), and arising under the Railway Labor Act, as amended (45 U. S. Code 151-163); in that there is particularly involved in this suit the construction and interpretation of certain provisions of said Railway Labor Act; intervener therefore admits that this Court has jurisdiction of this action, and of the parties hereto.

IV.

Answering paragraph 4 of said complaint, this intervener states that it has no information or belief sufficient to enable it to answer the allegations of said paragraph, and therefore denies each and every allegation of said paragraph for lack of such information and belief; except that intervener admits all those allegations of said paragraph 4 which are predicated upon official public records of the First Division of the National Railroad Adjustment Board.

V.

Answering paragraph 5 of said complaint, intervener alleges and shows that it is the employer identified in said paragraph 5 as "Southern Pacific Company (Pacific Lines), a corporation"; admits that W. W. May, the individual employe named and referred to in said paragraph 5, was heretofore employed by intervener as a yardmaster or assistant yardmaster; but denies that said May, as said yardmaster, was, while so employed, "otherwise known as a yard service employe", as in said paragraph 5 alleged.
112 Intervener admits that the claim and dispute of said May, as yardmaster, against this intervener as his employer, was handled in the usual manner required by the Railway Labor Act, up to and including the Chief Operating Officer of intervener designated to handle such disputes; admits further that thereafter plaintiff, Brotherhood of Railroad Trainmen, as petitioner, undertook to refer said claim and dispute of said May to the First Division of the National Railroad Adjustment Board, and purported to present to and file with said First Division a document styled by said plaintiff as an "Ex Parte Submission", substantially in the form of Exhibit "B" attached to said complaint; but in this behalf intervener alleges that said attempted reference of said dispute to said First Division, and the purported docketing thereof by said Division, were and each of them was wholly null and void and without any legal effect whatsoever, for the reason, as hereinafter more fully set forth, that no jurisdiction to entertain, consider, or decide said claim and dispute was or is lawfully vested in said First Division, exclusive jurisdiction thereof having been lawfully vested in the Fourth Division of said Board.

Intervener admits each and all of the remaining allegations of said paragraph 5 of the complaint, not otherwise herein denied.

VI.

Answering paragraph 6 of the complaint, intervener admits the allegations of the first two sentences of said paragraph; and in this behalf alleges that each and all of the members of the Fourth Division of the National Railroad Adjustment Board, including in particular the labor members referred to in said paragraph 6, at all times mentioned in said complaint have been, and now are, duly selected and appointed to said Fourth Division, in accordance with the provisions of Section 3 of the Railway Labor Act, and at all said times have been, and now are, the duly and
113 lawfully selected, qualified and acting members of said Fourth Division.

Intervener denies each and all of the allegations of the third sentence of said paragraph 6, commencing with the words "that the labor", in line 22 on page 7 of said complaint, and concluding with the words "Railway Labor Act", in line 2, page 8 thereof.

VII.

Answering paragraph 7 of said complaint, intervener admits the allegations of the first and second sentences of said paragraph 7; and denies each and every other allegation in the remainder of said paragraph, commencing with the words "that the terms", appearing in line 22 on page 8, and concluding with the words "yard service employees" in line 11, page 9, of the complaint.

VIII.

Answering paragraph 9 of said complaint, intervener admits that, substantially as alleged in said complaint, said First Division undertook to exercise jurisdiction in the disputes referred to in said paragraph, and to make and render awards therein, and that the several Exhibits "D", "E", "F" and "G", annexed to said complaint, are copies of said purported awards; but intervener alleges that no question as to the jurisdiction of said Division to consider or hear or determine said disputes was presented to or

decided by said Division in either or any of said disputes; that the assumption of jurisdiction, as aforesaid, by said First Division was in all respects, as to each of said cases, wholly without any legal warrant or justification whatsoever; and that each and all of said purported awards referred to in said paragraph 8 of the complaint, to wit, Awards Nos. 3609, 4077, 4150 and 2712 of said First Division, were and are wholly void, and of no legal or binding effect whatsoever.

IX.

114 Answering paragraph 9 of said complaint, intervener denies each and all of the allegations of said paragraph. In this behalf intervener alleges and shows that the duties of a railroad yardmaster consist primarily of directing and supervising subordinate employes, including engineers, firemen, hostlers, conductors, yard foremen, yardmen, helpers, brakemen, switch tenders, and other similar train-service and yard-service employes, when in the performance of their duties in and about railroad yards and terminals; that railroad yardmasters have charge of yards, and are responsible for conditions therein, and for the prompt and proper movement and handling of engines, trains, and cars in such yards; that said yardmasters are required, in the performance of their duties, to exercise a considerable measure of individual initiative and responsibility; that by reason of the general nature of their said duties and responsibilities, yardmasters are therefore classed, and generally regarded, in both the railroad industry generally and also in intervener's service, as "subordinate officials", and are not generally, or at all, regarded or classed or described as "yard service employes", within the established meaning of that term as used and understood in the railroad industry, or as the same appears in Section 3 (h) of the Railway Labor Act.

X.

Intervener denies each and all of the allegations of paragraph 10 of said complaint; in particular, intervener denies: (1) that said First Division of the National Railroad Adjustment Board now has, or ever has had, any lawful power or authority to establish its own jurisdiction over disputes involving railroad yardmasters, and (2) that the

National Mediation Board now has, or has ever had, any lawful power or authority, or has ever assumed or attempted to exercise any purported power or authority, to establish or determine that said First Division is vested with jurisdiction of disputes involving claims of yardmasters, either by the appointment of referees to hear and determine such yardmasters' disputes when docketed
115 with said First Division (as alleged in said paragraph 10 of the complaint), or otherwise.

XI.

Intervener denies each and all of the allegations of paragraph 11 of said complaint; and in this behalf, intervener alleges and shows that each of the plaintiffs, to the extent that they or either or any of them represent, either singly or collectively, any yardmasters employed by this intervener or by any other railroad carrier, is fully able to obtain a fair, ample, and lawful hearing and determination of each and every dispute and claim, arising out of the employment of or involving any such yardmaster, which is or may be subject to handling under the provisions of the Railway Labor Act and particularly Section 3 thereof, by presenting and submitting such claim or claims to the Fourth Division, National Railroad Adjustment Board.

Second Defense.

For a second and further defense to said complaint, and to the purported cause or causes of action therein, intervener shows and alleges:

I.

At all times material to this action intervener has been, and now is, a corporation, organized and existing under and by virtue of laws of the State of Kentucky, having its operating headquarters at San Francisco, California, and engaged in the operation of lines of railroad in interstate and foreign commerce. As such railroad common carrier, intervener is an "employer", within the meaning and definition of said term as set forth in Section 1, First, of the Railway Labor Act.

II.

At all of said times intervener has had, and now has, in its service upon its said railway lines a substantial number of employes classed as yardmasters, including assis-
116 tant yardmasters. Said yardmasters form and, in conformity with the general and accepted practice in the railroad industry, have been and are recognized by intervener as forming, a distinct craft or class of employes, which is wholly separate and apart from other recognized crafts or classes of employes, such as engineers, firemen, yardmen, or trainmen, which crafts similarly are also separately recognized by intervener, in conformity with general practice throughout the railroad industry.

Said craft or class of yardmasters in the employ of intervener is now, and at all times material to this action since and including September 17, 1937, has been duly represented, for all purposes of craft representation under the Railway Labor Act, by the Railroad Yardmasters of America, an unincorporated association. Said association is a standard railway labor organization, national in scope, within the meaning and intent of said term as used in the Railway Labor Act. As the representative of the craft of yardmasters upon intervener's lines, said association in its relations with intervener acts and has acted, by and through certain of its members designated as a general committee of said association for intervener's railroad lines. At all said times said general committee has had, and now has, a contract with intervener, styled and known as the "Yardmasters' Agreement, Southern Pacific Company, Pacific Lines", which was duly entered into in accordance with the provisions of the Railway Labor Act, and generally provides for the rates of pay, rules and working conditions of the members of said craft of yardmasters employed by intervener. A full, true and correct copy of said Yardmasters' Agreement curently in effect, and which became effective on August 1, 1941, is attached hereto as Exhibit "A", and by reference is made a part hereof.

III.

Yardmasters, including assistant yardmasters, have
117 at all times material to this action constituted a distinct and separate craft or class of employes for all purposes of representation and collective bargaining under

the Railway Labor Act. As heretofore set forth in paragraph IX of the first defense of this answer, the principal duties of railroad yardmasters, including assistant yardmasters, consist in the direction and supervision of train- and yard-service employes, while the latter are engaged in the performance of their various duties in and about such yards and terminals. The classes of employes particularly subject to the supervision and direction of such yardmasters include, in particular, engineers and firemen in both road and yard service, conductors and brakemen in road service, yard foremen, yard helpers, yardmen, and switch tenders, and other yard-service employes in yard service. A railroad yardmaster in the performance of his duties is required to and does exercise a substantial measure of individual initiative and responsibility; and yardmasters are therefore, in general railroad practice, classed and regarded, and upon intervener's lines in particular have been and are classed and regarded, as subordinate officials, and not as "yard-service employes", within the meaning of said term as regularly used in the railroad industry, or as said term appears in the Railway Labor Act.

IV.

Under the provisions of Section 3, Paragraph (h) of the Railway Labor Act, the First Division of the National Railroad Adjustment Board has jurisdiction over disputes involving train- and yard-service employes of carriers; that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen and yard-service employes. Said term "yard-service employes" includes, and is intended to include, only those employes in yard service whose duties and responsibilities are similar to those of engineers, firemen, conductors and trainmen in road train service; that is to say, yard engineers and firemen, 118 yard foremen (also known as "yard conductors"), yardmen (also known as "yard brakemen" or "helpers"), and switch tenders. Said term does not include, and is not intended to include, subordinate officials such as yardmasters, who, as aforesaid, exercise direction and supervision over such yard-service employes, as herein defined, in the performance of their duties.

It is not and never has been claimed that jurisdiction over disputes involving yardmasters is conferred upon either the Second or Third Divisions of said Board.

Since the Fourth Division of said Board is expressly given jurisdiction over disputes involving "all other employes of carriers over which jurisdiction is not given to the First, Second and Third Divisions", sole jurisdiction over all disputes and claims involving yardmasters which may be referred to said Board pursuant to the Railway Labor Act is conferred upon and resides in said Fourth Division.

V.

On July 11, 1938, this Court, in a proceeding then pending before it entitled "United States, ex rel, Railroad Yardmasters of America *vs.* National Railroad Adjustment Board, Fourth Division, et al.", which said proceeding was and is further identified upon the files and records of this Court as "Chancery No. 16031", duly rendered and entered its final decree and injunction, which said decree and injunction ever since has been and now is, in full force and effect, and has never been reversed, modified, or rescinded, wherein and whereby this Court found and concluded, among other things, that yardmasters are not included in any of the classes of employes over whose disputes jurisdiction is given by the Railway Labor Act to the First or Second or Third Divisions of the National Railroad Adjustment Board, and that neither of said last mentioned Divisions have jurisdiction of disputes involving yardmasters; that the Fourth Division of said Board has jurisdiction of said disputes; and that it was and is
119 the duty and jurisdiction of said Fourth Division, arising under the laws of the United States, to hear and determine such disputes involving yardmasters; and this Court further, in said cause, Chancery No. 16031, duly ordered, adjudged, and decreed that said Fourth Division be enjoined and commanded to take jurisdiction of, and to docket, hear, determine and enter awards on the merits in, three certain disputes theretofore filed with said Fourth Division by the aforesaid Railroad Yardmasters of America, acting on behalf of certain yardmasters employed by this intervener, and in which proceedings thus docketed with said Fourth Division this intervener was named as one of the parties to each such dispute. Thereafter, and on or about July 25, 1938, said Fourth Division, in obedience to said decree and injunction of this Court, duly and regularly made and entered its find-

ings and award in each such dispute, wherein and whereby, among other things, said Division found that as to each dispute it possessed jurisdiction thereof.

VI.

A plain, speedy and adequate remedy at law exists, whereby the plaintiffs and each of them may readily obtain the hearing, consideration and determination of each of the disputes involving yardmasters referred to in the complaint, and particularly in paragraphs 4 and 5 thereof, and of all other disputes of similar character in which said plaintiffs or either or any of them may desire such hearing and determination: namely, the presentation and filing of an appropriate petition in each such dispute with said Fourth Division, in manner and form as provided by the Railway Labor Act and the Rules of Procedure of said National Railroad Adjustment Board. Intervener is informed and believes, and therefore states it to be the fact, that plaintiffs and each of them have wholly failed and refused, and now continue to refuse, to avail themselves of said remedy, or to commence or carry for-
120 ward or otherwise to handle any proceedings with or before said Fourth Division, in disputes involving yardmasters.

Wherefore, intervener prays that this Court decree:

(1) That plaintiffs take nothing by their action;

(2) That plaintiffs are not entitled to any of the relief prayed for herein;

(3) That yardmasters are not "yard-service employes" within the meaning and intent of paragraph (h) of Section 3 of the Railway Labor Act;

(4) That the First Division of the National Railroad Adjustment Board therefore has no jurisdiction to hear, consider or determine disputes involving yardmasters, or arising out of their employment;

(5) That exclusive jurisdiction of such disputes involving yardmasters is vested in the Fourth Division of the National Railroad Adjustment Board;

(6) That the decree heretofore made and entered by this Court in Chancery No. 16031 is valid and binding; and must and should be so regarded by said First Division, and by each and all of the members thereof;

(7) That intervener have such other and further relief as may be proper in the premises.

208 So. LaSalle Street,
Chicago, Illinois.
Attorney for Southern Pacific Company, a corporation, Applicant-Intervener.

Henley C. Booth,
Burton Mason,
65 Market Street,
San Francisco, California,
Of Counsel.

122 And afterwards, to-wit, on the 10th day of April, 1942, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to-wit:

123 In the District Court of the United States.
* * (Caption—3788) * *

ORDER GRANTING LEAVE TO AMEND PETITION FOR DECLARATORY JUDGMENT AND ADD ADDITIONAL PARTIES DEFENDANT.

This cause coming on to be heard on Plaintiffs' motion for leave to make R. A. Walton, J. H. Blake, J. M. Fox, E. J. Hamner, F. A. Coile and E. Murrin additional parties defendant and for leave to file an amendment to the Petition for Declaratory Judgment herein, due notice having been given to counsel of record; and the Court being fully advised in the premises,

It Is Ordered:

1. That leave be, and is hereby, given to Plaintiffs to make the following named persons: R. R. Walton, J. H. Blake, J. M. Fox, E. J. Hamner, F. A. Coile, and E. Murrin, constituting the Fourth Division of the National Railroad Adjustment Board, additional parties defendant in the above entitled cause.

2. That Plaintiffs be, and they are hereby, granted leave to file instanter an amendment to the Petition for Declaratory Judgment heretofore filed by them.

Enter: Charles E. Woodward,
Judge.

Dated: April 10, 1942.

124 And on the same day, to-wit the 10th day of April, 1942, came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Amendment to Petition for Declaratory Judgment, in words and figures following, to-wit:

125 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—3788) * *

AMENDMENT TO PETITION FOR DECLARATORY JUDGMENT.

The plaintiffs, The Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President and S. R. Harvey, Assistant President, for their Amendment to the Petition for Declaratory Judgment, allege:

1. That the opening paragraph of said Petition is revised to read as follows:

"The Plaintiffs, The Order of Railway Conductors of America, a voluntary unincorporated association, by H. W. Fraser, President, and F. H. Nemitz, Senior Vice President, and Brotherhood of Railroad Trainmen, a voluntary unincorporated association, by A. F. Whitney, President, and S. R. Harvey, Assistant President, represent unto the court that this Petition for a Declaratory Judgment and other relief, is filed on behalf of the members of said plaintiffs' railroad labor organizations against the First Division and the Fourth Division of the National Railroad Adjustment Board, and thereupon allege:"

126 2. That a new paragraph be added to said petition immediately following paragraph 2 thereof, which said paragraph shall be numbered paragraph 2a, and shall read as follows:

"2a. Some of the defendants are members of the Fourth

Division of the National Railroad Adjustment Board, said Board being heretofore described in paragraph 2 of said Petition. The membership of the said Fourth Division consists of six members, three of whom are selected and designated by the carriers and three of whom are selected and designated by the National Maritime Organizations of the employees; that said Fourth Division has jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second and Third Divisions. Said defendants are, and at all the times mentioned herein, were the duly appointed, qualified and acting members of said National Railroad Adjustment Board, Fourth Division, and individually and collectively hold said offices under and by virtue of the Act of Congress referred to in paragraph 2 of said Petition; and as members of said Division said defendants maintain headquarters and conduct hearings, hold meetings and sessions in said City of Chicago, State of Illinois, as required by said Act of Congress. Said defendants at all times herein mentioned and herein referred to are and have been the regular members of said National Railroad Adjustment Board, Fourth Division, duly appointed and qualified under and pursuant to sub-section (h) of said Section 3 of the Railway Labor Act."

V. Craven Shuttleworth,
Merchants National Bank Bldg.,
Cedar Rapids, Iowa.

W. A. Endle,
820 Superior Avenue,
Cleveland, Ohio.

Everett L. Gordon,
100 W. Monroe St.,
Chicago, Illinois.

Attorneys for Plaintiffs.

127 State of Illinois } ss.
County of Cook }

J. A. Zanger, being first duly sworn according to law, deposes and says that he is Vice President of the Brotherhood of Railroad Trainmen, one of the plaintiffs in the above entitled cause; that he is fully authorized to make this verification on behalf of said Brotherhood of Railroad Trainmen and does make the same on behalf of said plaintiff; that he has read the foregoing Amendment to the Petition for Declaratory Judgment heretofore filed in said cause and that he knows the contents thereof; that he has personal knowledge of the facts and things therein set forth and that the allegations contained therein are true.

Further affiant sayeth not.

J. A. Zanger.

Subscribed and sworn to before me this 9th day of April, A. D. 1942.

E. C. Klopf,
(Seal) *Notary Public.*

128 And afterwards on, to wit, the 16th day of April, 1942, came the defendants, E. W. Fowler, et al, by their attorneys and filed in the Clerk's office of said Court their certain Supplemental Answer, in words and figures following, to wit:

129 IN THE DISTRICT COURT OF THE UNITED STATES
(Caption—3788)

SUPPLEMENTAL ANSWER OF DEFENDANTS E. W. FOWLER, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD and L. O. MURDOCK.

Defendants E. W. Fowler, T. K. Faherty, R. A. Knoff, L. L. McDonald and L. O. Murdock, the Carrier Members, pleading in response to the amendment of April 10, 1942, filed by the plaintiffs, for their joint and several amended and supplemental answer to the complaint and petition on file in the above entitled case, and to the amendment to said petition herein filed under date of April 10, 1942, respectfully show:

I.

To correct a typographical omission, they amend paragraph II of their answer already filed by inserting following the words "of America" in the third line of the second subparagraph of said paragraph, being the eighth line on page 2 of said answer, the following words:

"Brotherhood of Railroad Trainmen, Switchmen's Union of North America."

II.

Answering the additional paragraph, paragraph 2a, of said complaint, as amended, these defendants admit that R. A. Walton, J. H. Blake, J. M. Fox, F. A. Coile, E. J. 130 Hamner and E. Murrin are members of and constitute the Fourth Division of the National Railroad Adjustment Board; that E. J. Hamner, F. A. Coile and E. Murrin, three of said members of said Fourth Division, are selected and designated by the carriers; that R. A. Walton, J. H. Blake and J. M. Fox are the labor members of said Fourth Division, each of whom has been duly selected and designated as a labor member of said Fourth Division pursuant to the provisions of the Railway Labor Act.

These answering defendants admit each and all other allegations of said paragraph 2a.

Sidney R. Prince, Jr.,
1728 Consumers Building,
Chicago, Illinois,
Attorney for Defendants, E. W. Fowler, R. A. Knoff, L. O. Murdock, L. L. McDonald and T. K. Faherty.

Sidney C. Murray,
Chicago, Illinois.
Of Counsel.

This certifies that I have this 16th day of April, 1942, served a copy of this answer upon Everett L. Gordon, Attorney for the Plaintiffs, and Leo J. Hassenauer, Attorney for Defendants F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis; and likewise upon Messrs. Poppenhusen, Johnston, Thompson & Raymond, appearing for the Railroad Yardmasters of America, interveners; Mr. John A. Sheean, Attorney for Southern Pacific Co., intervener, and upon Messrs. Winston, Strawn & Shaw, Attorneys for Great Northern Railway Company, intervener.

Sydney R. Prince, Jr.

132 And on the same day, to wit, the 22d day of April, 1942, came the Intervener, Great Northern Railway Company, by its attorneys and filed in the Clerk's office of said Court its certain Answer to Amendment to Petition.

133 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—3788) * *

ANSWER OF INTERVENER, GREAT NORTHERN RAILWAY COMPANY, TO AMENDMENT TO PETITION.

Intervener Great Northern Railway Company, for its answer to the amendment to the petition made by the plaintiffs pursuant to the Court's order of April 10, 1942, respectfully shows:

I.

Answering the additional paragraph numbered 2a of said complaint, this defendant admits that R. A. Walton, J. H. Blake, J. M. Fox, F. A. Coile, E. J. Hamner and E. Murrin are members of and constitute the Fourth Division of the National Railroad Adjustment Board; that E. J. Hamner, F. A. Coile and E. Murrin, three of said members of said Fourth Division, are selected and designated by the carriers; that R. A. Walton, J. H. Blake and J. M. Fox are the labor members of said Fourth Division, each of whom has been duly selected and designated as a labor member of said Fourth Division pursuant to the provisions of
134 the Railway Labor Act. This defendant admits each and all other allegations in said paragraph 2a.

Winston, Strawn & Shaw and
Bryce L. Hamilton,
First National Bank Building,
Chicago, Illinois,
Attorneys for Intervener, Great Northern Railway Company.

F. G. Dorety,
R. J. Hagman,
1120 Great Northern Building,
St. Paul, Minnesota,
Of Counsel.

136 And on the same day, to wit, the 8th day of May, 1942, came the Interven Southern Pacific Company, by its attorneys and filed in the Clerk's office of said Court its certain Supplemental Answer to Complaint as Amended April 10, 1942, in words and figures following, to wit:

137 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—3788) * *

SUPPLEMENTAL ANSWER OF SOUTHERN PACIFIC COMPANY, INTERVENER, TO COMPLAINT AS AMENDED APRIL 10, 1942.

Southern Pacific Company, the above named intervener, answering the complaint herein as amended pursuant to leave granted on April 10, 1942, admits, alleges and denies as follows:

Intervener admits the allegations of said amendment to said complaint, identified by plaintiffs as paragraph 2a thereof.

Intervener further refers to its answer in intervention, filed herein pursuant to leave of thi Court on March 9, 1942, and repeats the allegations, admissions and denials thereof, with the same force and effect as if here again set forth in full, and renews its prayer for judgment accordingly.

John A. Sheean,
208 South LaSalle Street,
Chicago Illinois,
Attorney for Southern Pacific Company, a corporation, Intervener.

Henley C. Booth,
Burton Mason,
65 Market Street,
San Francisco, California.
Of Counsel.

138 And afterwards on, to wit, the 10th day of June, 1942, came the E. J. Hamner, et al, by their attorneys and filed in the Clerk's office of said Court their certain Answer, in words and figures following, to wit:

139 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—3788) * *

ANSWER OF THE DEFENDANTS E. J. HAMNER, F. A. COILE AND E. MURRIN.

The joint and several answer of defendants E. J. Hamner, F. A. Coile and E. Murrin, the Carrier Members of the Fourth Division of the National Railroad Adjustment Board, respectfully shows:

1. They adopt as their own the Answer, Further Answer and Counter-Claim of the Carrier Members of the First Division of the National Railroad Adjustment Board, which was refiled by the latter on April 16, 1942, following the amendment of the complaint herein.

E. J. Hamner,
F. A. Coile,
E. Murrin.

June 10, 1942.
John Knox,
Sydney R. Prince, Jr.,
Attorneys for Messrs. E. J. Hamner, F. A. Coile and E. Murrin,
10 S. LaSalle Street,
Chicago, Illinois.
Of Counsel.

This certifies that I have this 10th day of June, 1942, served a copy of this answer upon Everett L. Gordon, Attorney for the Plaintiffs, and Leo J. Hassenauer, At-
140 torney for Defendants F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis; and likewise upon Messrs. Poppenhusen, Johnston, Thompson & Raymond, appearing for the Railroad Yardmasters of America, interveners; Mr. John A. Sheean, Attorney for Southern Pacific Co., intervener, and upon Messrs. Winston, Strawn & Shaw, Attorneys for Great Northern Railway Company, intervener.

Sydney R. Prince, Jr.

141 And afterwards on, to wit, the 30th day of October, 1942, came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Reply to Counterclaim of The Railroad Yardmasters of America, Intervener, in words and figures following, to wit:

142 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—3788) * *

REPLY TO COUNTERCLAIM OF THE RAILROAD YARDMASTERS OF AMERICA, INTERVENER,

Now come the plaintiffs in the above entitled cause and by way of reply to the counterclaim of the Yardmasters of America, intervener herein, state and allege as follows:

1. Plaintiffs admit that the Railroad Yardmasters of America is a voluntary unincorporated association, as alleged in paragraph 1 of said counterclaim, and deny each and every other allegation of said paragraph.

2. Plaintiffs admit the allegations of paragraph 2 of said counterclaim.

3. Plaintiffs deny each and every allegation in paragraph 3 of said counterclaim.

4. Plaintiffs admit that a decree was entered in cause No. 16031 in this Court and that Exhibit "A" attached to intervener's counterclaim is a true and correct copy thereof, but deny each and every other allegation of said paragraph 4, and further specifically deny that said decree, Exhibit "A," is in any manner binding upon these plaintiffs.

143 And for a further defense plaintiffs state that they were not parties to the suit in which said decree was entered and had no knowledge of said suit and that the decree and the findings contained therein are not res adjudicata of the issues in this cause as to the plaintiff herein or either of them.

5. Plaintiffs deny each and every allegation in paragraph 5.

6. Plaintiffs admit the allegations contained in paragraph 6.

7. Plaintiffs admit the allegations contained in paragraph 7.

8. Plaintiffs deny the allegations contained in paragraph 8.

Wherefore, plaintiffs pray that intervener's counterclaim be dismissed and plaintiffs have the relief prayed for in its original petition filed herein. And plaintiffs further pray that this Court, by declaratory judgment, declare and adjudge that the First Division of the National Railroad Adjustment Board has sole and exclusive jurisdiction to hear, docket and entertain and enter awards on disputes involving Yardmasters, as set forth in the Petition for Declaratory Judgment which have heretofore been referred to the First Division of said Board, under the terms of the Railway Labor Act and which remain undetermined and all other disputes involving yardmasters which may hereafter be referred to said First Division of the National Railroad Adjustment Board.

The Order of Railway Conductors of America,
H. W. Fraser, *President*, and F. H. Nemitz,
Senior Vice President; and
Brotherhood of Railroad Trainmen,
A. F. Whitney, *President*, and S. R. Harvey,
Assistant President, Plaintiffs.
By Everett L. Gordon,
Their duly authorized
agent in this behalf.

144 State of Illinois } ss.
County of Cook }

Everett L. Gordon, being first duly sworn on oath, deposes and says that he is the duly authorized agent in this behalf of the Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President, plaintiffs in the above entitled cause; that he has read the foregoing reply of said plaintiffs to the counterclaim of the Railroad Yardmasters of America, intervener, and knows the contents thereof; that he has knowledge of the facts and that matters and things therein set forth are true to the best of his knowledge, information and belief.

Further affiant sayeth not.

Everett L. Gordon.

Subscribed and sworn to before me this 29th day of October, A. D. 1942.

Joseph J. Loverde,
Notary Public.

145 And on the same day, to wit, the 30th day of October, 1942, came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Reply to Answer and Counterclaim of Defendants E. W. Fowler, et al, in words and figures following, to wit:

146 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—3788) * *

REPLY TO ANSWER AND COUNTERCLAIM OF DEFENDANTS, E. W. FOWLER, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD AND L. O. MURDOCK.

Now come the plaintiffs in the above entitled cause and by way of reply to the answer and counterclaim of defendants E. W. Fowler, T. K. Faherty, R. A. Knoff, L. L. McDonald and L. O. Murdock, and state and allege as follows:

1. Plaintiffs herein, in answer to the answer and counterclaim of these defendants state and allege that this Court should dismiss paragraph 12 of said answer and counterclaim as not being an appropriate pleading by incorporating the preceding eleven paragraphs of its answer for the reason that paragraph 12 of said answer and counterclaim does not set forth any new matter upon which this Court could grant the relief as prayed for in said counterclaim.

2. The plaintiffs deny the allegations set forth in paragraph 13 of said answer and counterclaim and further state and allege that such proceedings, if any, which may have been before the Fourth Division of the National Railroad Adjustment Board, are in no manner binding upon these plaintiffs.

147 Wherefore, plaintiffs pray that said defendants' answer and counterclaim be dismissed and plaintiffs have the relief prayed for in its original petition filed herein. And plaintiffs further pray that this Court, by declaratory judgment, declare and adjudge that the First Division of the National Railroad Adjustment Board has sole and exclusive jurisdiction to hear, docket and entertain and enter awards on disputes involving Yardmasters, as set forth in the Petition for Declaratory Judgment, which have heretofore been referred to the First Division of said Board, under the terms of the Railway Labor Act and

which remain undetermined and all other disputes involving yardmasters which may hereafter be referred to said First Division of the National Railroad Adjustment Board.

The Order of Railway Conductors of America,
H. W. Fraser, *President*, and F. H. Nemitz,
Senior Vice President; and
Brotherhood of Railroad Trainmen,
A. F. Whitney, *President*, and S. R. Harvey,
Assistant President, Plaintiffs.
By Everett L. Gordon,
Their duly authorized agent in this behalf.

148 And afterwards on, to wit, the 6th day of August, 1943, came the parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation of Facts, in words and figures following, to wit:

149 IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—3788) • •

STIPULATION

1. The parties to this cause, by their respective attorneys, hereby stipulate that the statements and conclusions of fact herein set forth shall, for the purpose of
150 determining the issues involved in this cause and for no other purpose, be deemed and considered to be true and correct, and that all matters herein set forth, together with the facts admitted to be true in the pleadings herein, shall be received by the Court as having been duly established and proved, except as objection to the competence, materiality, or relevance of any matter herein set forth shall be made by any party hereto, such right so to object being hereby reserved to each of the said parties. Each party also reserves the right to offer and introduce at the trial evidence on his own behalf in addition to the evidence agreed upon in this stipulation.

2. It is further stipulated that any award of a Division of the National Railroad Adjustment Board or any submission by a party to a proceeding before any such Division or any portion of such award or submission shall, by reference to and identification of such award or submission

or portion thereof at the trial of this cause, become and be a part of the record herein for all purposes and with the same force and effect as if the same were physically embraced in the record, subject to objection on the ground of competence, materiality, or relevance.

3. The plaintiffs claim that this is a suit of a civil nature arising under the Constitution and laws of the United
151 States, more particularly under the Act of Congress of May 20, 1926, as amended June 21, 1934, 45 U. S. C., Secs. 151-163, known as the Railway Labor Act, and the laws of the United States relating to interstate commerce, and that it is instituted pursuant to the provisions of said statutes and Section 247d(1) of the Judicial Code, 28 U.S.C., Sec. 400(1), and also under the general equity jurisdiction of this Court, by reason whereof this Court has jurisdiction of this suit. It is agreed by all the parties to this stipulation that the pleadings raise no jurisdictional issue.

Agreed Statement of Facts.

4. Plaintiff The Order of Railway Conductors of America is a voluntary, unincorporated association of railroad employees, national in scope, with headquarters, general offices and post-office address at Cedar Rapids, Iowa; plaintiff H. W. Fraser is the duly elected, qualified, and acting president of said association, and plaintiff F. H. Nemitz is its duly elected, qualified, and acting senior vice president.

5. Plaintiff Brotherhood of Railroad Trainmen is a voluntary, unincorporated association of railroad employees, national in scope, with headquarters, general offices and post-office address at Cleveland, Ohio; plaintiff A. F. Whitney is the duly elected, qualified, and acting president of said association, and plaintiff S. R. Harvey is its duly elected, qualified, and acting assistant president.

6. The defendants E. W. Fowler, T. K. Flaherty, R. A. Knoff, L. L. McDonald and L. O. Murdock are the duly qualified and acting members of the First Division of
152 the National Railroad Adjustment Board, selected and designated by the carriers (as that term is defined in the Railway Labor Act, 45 U.S.C., Sec. 151); the defendants F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis are the duly qualified and acting members of the said First Division, selected and designated by certain national labor organizations of employees

of carriers. F. J. Williams is a member and officer of the Order of Railway Conductors of America, William Bishop a member and officer of the Brotherhood of Railroad Trainmen, Paul M. Carter a member and officer of the Switchmen's Union of North America, R. E. Edrington a member and officer of the Brotherhood of Locomotive Engineers, and Fred Lewis a member and officer of the Brotherhood of Locomotive Firemen and Enginemen.

7. The defendants E. J. Hamner, F. A. Coile and E. Murrin are the duly qualified and acting members of the Fourth Division of the National Railroad Adjustment Board, selected and designated by the carriers; the defendants R. A. Walton, J. H. Blake and J. M. Fox are duly qualified and acting members of the said Fourth Division, selected and designated by certain national labor organizations of employees of carriers. R. A. Walton is a member and officer of the International Longshoremen's Association, J. H. Blake a member and officer of the National Marine Engineers' Beneficial Association, and J. M. Fox a member and officer of the Inland Boatmen's Union of the Pacific.

8. The intervenor herein, Railroad Yardmasters of America, is a voluntary, unincorporated association of railroad employees, national in scope, with headquarters, general offices and post-office address at Columbus, Ohio.

153 9. The intervenor herein, Great Northern Railway Company, a corporation having its principal office in St. Paul, Minnesota, is a carrier.

10. The intervenor herein, Southern Pacific Company (Pacific Lines), a corporation having its principal office in San Francisco, California, is a carrier.

11. On March 15, 1938, the Railroad Yardmasters of America submitted to the Fourth Division of the National Railroad Adjustment Board a claim of R. V. Murphy against his employer, Southern Pacific Company (Pacific Lines), growing out of an alleged violation of said employee's rights as a yardmaster. On the same date the Railroad Yardmasters of America also submitted to the said Fourth Division a claim of J. Besant and a claim of E. F. Wheeler, each claim growing out of an alleged violation by the employer, the Southern Pacific Company (Pacific Lines), of the claimant's rights as a yardmaster. On March 24, 1938, the secretary of the Fourth Division, pur-

suant to the instruction of the members of said Division, informed the president of the Railroad Yardmasters of America and the chief operating officer of the Southern Pacific Company (Pacific Lines) that the members of the Fourth Division had deadlocked on the question of assuming jurisdiction to hear and render awards in the aforesaid three cases.

12. On April 13, 1938, the Railroad Yardmasters of America and the aforesaid Murphy, Besant and Wheeler filed a petition for mandamus or mandatory injunction against the members of the Fourth Division of the National Railroad Adjustment Board and the secretary of said Division in the District Court of the United States for
154 the Northern District of Illinois, Eastern Division, the number of the cause being 16031, in chancery. A true and correct copy of certain pleadings in said cause, petitioners' motion that the petition for injunction be taken as confessed, and the final decree entered therein on July 11, 1938, is attached hereto as Exhibit 1. Said final decree commanded the members of the Fourth Division to hear and render awards in the aforesaid cases of Murphy, Besant and Wheeler.

13. On August 13, 1938, the Order of Railway Conductors of America and the Great Northern Railway Company joined in the submission to the Fourth Division of the National Railroad Adjustment Board of the claims of two employees of the said carrier, V. E. Benjamin and M. L. Nagle, growing out of alleged violations by the employer of the said employees' rights as yardmasters. Said joint submission was accepted by the Fourth Division on August 18, 1938. On August 25, 1938, the Order of Railway Conductors of America wrote and sent to the Great Northern Railway Company a letter formally requesting that the carrier withdraw any papers it may have sent to the Fourth Division in connection with said submission and join the Order of Railway Conductors of America in a submission of the claims of Benjamin and Nagle to the First Division of the National Railroad Adjustment Board. A true and correct copy of said letter is attached hereto as Exhibit 2. The Great Northern Railway Company replied to said letter on August 30, 1938, declining to agree to a submission of the claims of Benjamin and Nagle to the First Division.

A true and correct copy of said letter of reply is at-
155 tached hereto as Exhibit 3. On September 1, 1938, the Order of Railway Conductors of America notified the Fourth Division that it was withdrawing its submission of the claims of Benjamin and Nagle to that Division, and on September 2, 1938, the secretary of the Fourth Division referred said notice of withdrawal to the Great Northern Railway Company. True and correct copies of said notice of withdrawal and said letter of reference are attached hereto as Exhibits 4 and 5, respectively. On September 3, 1938, the carrier informed the Fourth Division by letter that it had no objection to the withdrawal of the Order of Railway Conductors of America, since that organization was the complainant in the case. A true and correct copy of said letter is attached hereto as Exhibit 6. On September 12, 1938, the Fourth Division granted the request for withdrawal and closed the docket.

14. On October 11, 1938, the Order of Railway Conductors of America made an ex parte submission of the aforesaid claims of Benjamin and Nagle to the First Division of the National Railroad Adjustment Board, and said submission was docketed on October 24, 1938, as number 6404 in the official records of said First Division. On October 21, 1938, the Great Northern Railway Company filed in the same docket its ex parte submission denying the jurisdiction of the First Division over the subject-matter of said claims. The aforesaid claims of Benjamin and Nagle, prior to being submitted as aforesaid to the First Division of the National Railroad Adjustment Board, had been handled in the usual manner up to and including the chief operating officer of the Great Northern Railway Company designated
to handle such disputes. Such handling had been com-
156 pleted, and nothing on the date of reference to the said First Division remained to be done in order to complete handling in the usual manner up to and including such chief operating officer.

15. On January 4, 1941, the Brotherhood of Railroad Trainmen made an ex parte submission to the First Division of the National Railroad Adjustment Board of a claim of W. W. May, an employee of the Southern Pacific Company (Pacific Lines), growing out of an alleged violation by the employer of the employee's rights as a yardmaster. This submission was docketed on March 26, 1941, as number 12295 in the official records of the said First Division.

On March 24, 1941, the Southern Pacific Company (Pacific Lines) filed its ex parte submission in the same docket, denying the jurisdiction of the First Division over the subject-matter of said claim. The aforesaid claim of W. W. May, prior to submission by the Brotherhood of Railroad Trainmen to the First Division of the National Railroad Adjustment Board, had been handled in the usual manner up to and including the chief operating officer of the Southern Pacific Company (Pacific Lines) designated to handle such disputes. Such handling had been completed, and nothing on the date of reference to said First Division remained to be done in order to complete handling in the usual manner up to and including such chief operating officer.

16. On August 28, 1941, the carrier members of the First Division of the National Railroad Adjustment Board wrote and sent to the labor members of said Division a letter stating that the carrier members would not participate in the hearing of certain disputes then docketed in the First Division, on the ground that such disputes involved 157 yardmasters and were therefore not within the jurisdiction of the First Division, and proposing that said disputes and similar disputes arising in future be docketed with the Fourth Division of the National Railroad Adjustment Board. The carrier members referred in their letter to the final decree entered on July 11, 1938, in the case heretofore mentioned in paragraph 12, in which the Fourth Division had been ordered to hear and render awards in the three disputes heretofore mentioned in paragraph 11. A true and correct copy of said letter of August 28, 1941, is attached hereto as Exhibit 7. The cases referred to in said letter, in which the carrier members declined to participate, were those docketed in the First Division of the National Railroad Adjustment Board as numbers 6404, 10665, 11801, 12101, 12277, 12278, 12280, 12294 and 12295, the number 6404 being the submission of the claims of Benjamin and Nagle heretofore mentioned in paragraph 14 and the number 12295 being the submission of the claim of W. W. May heretofore mentioned in paragraph 15. The carrier members of the First Division still refuse to participate in the consideration of the cases mentioned in their letter of August 28, 1941, and said disputes remain for that reason unadjusted by the First Division. Since August 28, 1941, the carrier members of the First Division have in-

formed the labor members of the said Division of their conclusion that still other disputes docketed with the First Division are not within its jurisdiction and of their determination not to participate in any consideration of the merits of such disputes, on the ground that the disputes involve yardmasters. Said disputes bear docket numbers in the First Division as follows: 4535, 4536, 6406, 6644, 6837, 8970, 10109, 13318. By reason of the refusal 158 of the carrier members of the First Division to participate in the cases last mentioned, they also remain unadjusted by the First Division.

17. Subsequent to the rendition of the decree in Chancery No. 16031, referred to in paragraph 12 above, the First Division of the National Railroad Adjustment Board took jurisdiction, held hearings, and rendered awards in the following cases:

(a) On March 6, 1939, the First Division of the National Railroad Adjustment Board rendered its Award 3609, in Docket 5994, Brotherhood of Railroad Trainmen *vs.* Baltimore & Ohio Ry. Co. A true and correct copy of the claims, findings, and award made in said case, as officially published by the National Railroad Adjustment Board, First Division, is attached as Exhibit D to the petition of the plaintiffs heretofore filed in this case.

(b) On August , 1939, the First Division of the National Railroad Adjustment Board rendered its Award 4077, in Docket 6960, Brotherhood of Railroad Trainmen *vs.* Southern Pacific Co. (Pacific Lines). A true and correct copy of the claims, findings, and award made in said case, as officially published by the National Railroad Adjustment Board, First Division, is attached as Exhibit E to the petition of the plaintiffs heretofore filed in this case.

(c) On August 24, 1939, the First Division of the National Railroad Adjustment Board rendered its Award 4150, in Docket 6549, Brotherhood of Railroad Trainmen *vs.* Northern Pacific Terminal Co. of Oregon. A true and correct copy of the claims, findings, and award made in said case, as officially published by the National Railroad Adjustment Board, First Division, is attached as Exhibit F to the petition of the plaintiffs heretofore filed in this case.

18. Yardmasters employed by rail carriers are represented by labor organizations as follows:

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	Number of Carriers	Represented Mileage	% of Represented Mileage	% of Total Railroad Mileage
Railroad Yardmasters of America	30	119,705	60%	52%
Brotherhood of Railroad Trainmen	11	29,746	15%	13%
System associations	11	15,111	7.5%	7%
Order of Railway Conductors	9	13,715	7%	6%
Railroad Yardmasters of North America	7	10,748	5%	5%
American Railway Supervisors' Association	2	9,190	4.5%	4%
Switchmen's Union of North America	2	2,287	1%	1%
	76	200,502	100%	88%

19. A railroad yard is a system of tracks within defined limits, over which movements of engines and cars not authorized by timetable or train order may be made, subject to prescribed signals and rules or special instructions. A yard engine is an engine assigned to yard service and working within yard limits. The work performed in a yard includes switching, making and breaking up trains, storing cars, moving trains into, out of, and through the yard, inspecting cars and freight, repairing cars, maintaining track and other fixed equipment, sending and receiving messages by telephone and telegraph, keeping records, and making reports. The employees who perform such work include those known as yardmen, that is, switch or yard foremen, yard helpers, and switchtenders, and employees in train and engine service, such as engineers, firemen, hostlers, conductors, brakemen, flagmen, and baggagemen; they also include clerks, telephone and telegraph operators in yard offices, towermen operating interlocking switches, maintenance-of-way foremen and laborers, signal department forces engaged in the maintenance of yard signal plants, and car inspectors and repairers. All such yardmen and other employees performing work in a yard are directed and supervised in their work by a yardmaster, with the aid, if necessary, of one or more assistant yardmasters,
160 Yardmasters do not and may not perform the work of yardmen and employees in train and engine service; they may perform some clerical work, if their entire time is not taken up with the direction and supervision of yardmen and other employees working in yards.

20. The duties of yardmasters include the following:

(a) In general, yardmasters run the yards, of which they

are in charge, and they are responsible for conditions within the same. Necessarily, they exercise a substantial measure of individual initiative and responsibility.

(b) The duties of yardmasters vary at different terminals, because of the nature and quantity of the traffic passing through or assembled, distributed, and interchanged at different terminals. Depending upon the size and nature of the yard, the yardmaster's duties may be performed by him in person or they may be exercised under his supervision by as many as fifty or more subordinate employees. The yardmaster is responsible for all work necessary in the running of the yard, in the sense that he must see that such work is done and is done properly, whether the work is yard service, train and engine service, clerical service, communication service maintenance service, repair service, or in some cases, dealing with patrons in the matter of shipments arriving at, passing through, or departing from the yard. A yardmaster, however, is not permitted actually to perform the work of certain classes of employees under his supervision, such as passing signals, riding cars to a stop, and throwing switches. His duties with respect to the physical movement of trains and engines, maintenance, and repair are purely supervisory.

161 (c) Yardmasters report to and receive instructions from the general yardmaster, the trainmaster, and such other superior officers as may require information on the operation of yards and industrial districts assigned thereto. Yardmasters must also comply with instructions from the chief train dispatcher and from stationmasters and agents in matters pertaining to station work. They must maintain records and furnish reports, as required, and see that such records and reports are in accordance with instructions. Yardmasters keep directly in touch with subordinate heads of the mechanical and car departments, with regard to the use of locomotives, the inspection of trains, engines, and cars, and the repair of loaded cars cut out of trains.

(d) The yardmaster has direct supervision over employees engaged in making up, breaking up, and switching trains within yards and industrial districts assigned thereto; also direct supervision over employees who perform work incidental to the operation of the yard. The employees under the yardmaster's supervision include yard or engine foremen, yard helpers, switchtenders, engineers, firemen, brakemen, hostlers, hostler helpers, conductors, office clerks,

telephone and telegraph operators, towermen, signalmen, car inspectors and repairers, track maintenance foremen and laborers, car retarder operators, car checkers, yard checkers, and weighmasters.

(e) The yardmaster must see that all official orders and notices are posted on the bulletin board. He allocates the work to be performed by the employees under his supervision, marking up assignments, calls, etc., on the board, in accordance with schedule requirements. He checks
162 the time of such employees and certifies as to its correctness. The yardmaster must see that no more engines and men are used than are actually required, must decide when engines and men should be cut off or added, and consults with his superiors about the employment of additional forces. He must see that trainmen report for duty at the appointed time. He is responsible for the proper conduct of the employees under his supervision and must see that they are in fit condition to perform their work. The yardmaster must familiarize himself with the rules governing the employees in his charge and must require safe, prompt, and efficient discharge of their duties. He reports to the superintendent of transportation any disobeyance of rules or other misconduct on the part of any employe which may come under his notice.

(f) The yardmaster has charge of the movement of trains and engines in the yard. He directs the make-up and break-up of trains and the distribution of cars. He keeps directly in touch with the chief train dispatcher and with yardmasters at other terminals with regard to train movements and the handling of crews. He must know the geography of the system and the routes of traffic between different divisions of the system. The yardmaster designates track assignments for the reception or make-up of trains and gives notice to all concerned, such as roundhouse forces, inspectors, etc., as to trains ordered. He must take an inventory of all cars in the yard as often as necessary to insure prompt movement and must prepare all necessary reports, lists, etc., or see that the same are prepared, pertaining to handling of cars in the yard.

163 (g) The yardmaster must see that cars are not unnecessarily delayed in the yards, that cars to be transferred, or the lading of which is to be transferred, are promptly placed, and that high-class trains are put through the yard with the least possible delay.

(h) The yardmaster must see that trains are made up and taken out at the designated times. He must familiarize himself with instructions on refrigeration, ventilation, and the protection of perishable freight. He gives notice to all concerned as to cars to be cleaned, iced, heated, ventilated, etc. He designates detour routes through the yard when switches are run through or cars are derailed and when emergencies arise involving unsafe tracks. He is responsible for the proper placement of cars at industrial plants, freight houses, and other company facilities.

(i) The yardmaster must see that conductors are furnished with waybills or other authority for the movement of the cars in their trains. He must secure disposition to be made of cars arriving without proper waybills or orders for further movement.

(j) The yardmaster determines the make-up of outbound trains, and in doing so must observe the governing rules promulgated by his employer and the Interstate Commerce Commission. He must see that trains have the required tonnage and that the engine for a train is ready at the appointed time.

(k) The yardmaster is responsible for the fulfillment of all requirements as to movement, switching, and protection of cars and freight contained therein. He must see that trains are made up in the order designated, and that
164 freight assigned to a particular train is forwarded by that train.

(l) The yardmaster is responsible for the careful handling of cars within the yard. He must see that no unnecessary noise is made by engines, cars, and employees, giving particular attention to work in connection with or near cars occupied by passengers. He must give notice to all concerned as to track conditions when switches are run through or cars are derailed or when emergencies arise involving unsafe tracks.

(m) The yardmaster makes arrangements with and gives information to shippers and consignees regarding the switching of cars, the supply of cars for outbound loading, and the delivery of inbound carload shipments.

(n) The yardmaster must see that opportunity is given for proper inspection of cars and that such inspection is made. He must see that proper slips or waybills accompany each loaded car and, when so ordered, each empty car, and that waybills are received for cars arriving. He

must keep a record of all trains and cars, noting any irregularities and seeing that reports of the same are made to the proper officers. He must report all cars arriving without proper waybills and cars whose freight is received in damaged condition or is improperly loaded. Unless otherwise instructed, the yardmaster must keep a record of the seals on each car arriving at or departing from the yard, giving date, train number, initials, and car number. He must see that the doors of loaded cars are properly secured and sealed, that the doors of empty cars are closed and secured, and, when the doors swing outward on hinges,
165 that such doors are sealed. If a loaded car is found not to be properly sealed, the yardmaster must have the contents promptly examined and must seal the car and make prompt report to the superintendent.

(o) The yardmaster must see that cars requiring repair are promptly placed on the repair track or are sent to the shops, as the case may require, and must notify the men who are to move the car that it is in bad order, so that they will exercise care in handling it in order to prevent injury to themselves and additional damage to the car.

21. The Consolidated Code of Transportation Rules and General Instructions (edition of 1939) issued by the intervening defendant, Great Northern Railway Company, for the government of its employees, defines the terms yard and yard engine (page 8) as follows:

"Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by timetable, or by train order, may be made, subject to prescribed signals and rules, or special instructions.

"Yard Engine.—And engine assigned to yard service and working within yard limits."

The following rules and regulations governing yardmasters are found in the aforesaid publication (page 121):

"Yardmasters.

"840. At stations where a yardmaster is employed, the general direction and government of the yard is in his charge, and all persons employed in yard service must obey his instructions.

"They must see that cars are carefully handled and no unnecessary noise made by engines or employes, giving particular attention to the work in connection with or near

sleeping cars in service and see that the occupants are not unnecessarily disturbed.

"841. Yardmasters are responsible for the proper make-up and movement of trains through yards, the prompt handling of cars and the requirements as to the diversion, refrigeration, ventilation and heating, and for the proper position and security of all yard switches. Main track switches, except when in use, must be locked for the main track."

166 Other duties to be performed by yardmasters are set forth in a book of rules and regulations published by said carrier for the government of employees in its operating department, as follows:

"970. Yardmasters report directly to Agents and obey instructions of Superintendent, Assistant Superintendents, Trainmasters and Chief Dispatchers.

"971. They have charge of yards, of the men employed, the handling of trains and the movement of cars therein.

"972. It is their duty to see that the trainmen, enginemen and engines are ready for duty at the appointed times; that trains are properly made up (see Rule 872), inspected and ready to leave on time and that doors of cars are properly secured.

"973. They must see that cars are not unnecessarily delayed in yards; that they are inspected and those needing heavy repairs are promptly sent to the shops or placed on repair tracks.

"974. They must see that all tracks are switched promptly and regularly; that transfer tracks with foreign lines are worked at the agreed upon times; that deliveries to industry, team and private tracks are made without delay and that repair and shop tracks are switched daily at the appointed times.

"They must insist on air hose being parted by hand and never permit them to be pulled apart.

"975. They must not permit a train to start or yard engine to move with an engineman, conductor, yard foreman, or a brakeman connected with it who is under the influence of liquor or unfit for duty. They must report such cases promptly to the Agent and Superintendent.

"976. They must be familiar with the rules governing men in train service and the duties of all employes connected with freight trains; must require the efficient discharge of such duties while in their yards and report violations of the rules coming to their notice.

"977. They will be held responsible for the proper position of switches. Main line switches in yards must be set and locked for main track except when in actual use. Inside switches except those on passing tracks may be left as used.

"978. They must see that all bulletins and other official notices are posted on the bulletin board and that the necessary reports required of them are made promptly."

167 22. The Rules and Regulations published by the intervening defendant, Southern Pacific Company (Pacific Lines), for the government of employees in its transportation department define the terms yard and yard engine (page 7) as follows:

"Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and rules, or special instructions.

"Yard Engine.—An engine assigned to yard service and working within yard limits."

The aforesaid publication prescribes the following rules for yardmasters (page 138):

"842. Yardmasters are responsible for conditions within yards. Trains and engines will be under the control of the yardmaster, and all employees in train, engine or yard service will be subject to his direction as to movements within yard limits. Road crews of trains entering yards will be responsible for their respective trains and engines until the yardmaster or his representative takes charge.

"Yardmasters will keep advised of important trains, such as stock, fruit and manifest, and make every effort to get them through the yard with the least possible delay. They must see that cars loaded with explosives and inflammable material are placed in the train the prescribed distance from the engine and caboose. Freight assigned to particular trains must be forwarded in such trains. In the absence of other instructions trains may be filled with non-manifest in order of its importance.

"843. The general direction and government of a train is vested in the conductor, and all other persons employed on the train will obey his instructions. Should there be any doubt as to authority or safety of proceeding he will consult the engineer, who will be responsible with him for the safety and the proper handling of the train and such use of signals and other precautions as circumstances may

require. He must obey the instructions of yardmasters within yard limits and be governed by the direction of agents in doing work at stations, and conform to the instructions issued by the Traffic and Accounting Departments."

23. In the 76th Congress, 3d Session, a bill (S. 4375) was introduced on September 23, 1940, by Senator 168 Smith, at the request of the American Short Line Railroad Association, entitled "A bill to amend the Railway Labor Act approved May 20, 1926, as amended June 21, 1934, and for other purposes," and containing the following provisions:

"(9) (a) The first division of the Adjustment Board shall have jurisdiction over disputes involving train-and-yard-service employees of carriers, including engineers, firemen, hostlers, outside hostler helpers, conductors, trainmen and yard-service employees, except yardmasters and other subordinate officers.

• • • • •

"(d) The fourth division of the Adjustment Board shall have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions."

Said bill, after two readings on the day of its introduction, was referred to the Senate Committee on Interstate Commerce, where it remained until the expiration of the 76th Congress without having been reported back to the Senate.

24. In the 77th Congress, 1st Session, a bill (S. 1660) was introduced on June 26, 1941, by Senator Smith, at the request of the American Short Line Railroad Association, entitled "A bill to amend the Railway Labor Act, approved May 20, 1926, as amended June 21, 1934, and for other purposes," and containing the following provisions:

"(5) The Board shall be composed of four Divisions, whose awards shall be independent of one another.

"(a) The first Division of the Board shall have jurisdiction over disputes involving train-and-yard-service employees of carriers, including engineers, firemen, hostlers, outside hostler helpers, conductors, trainmen, and yard-service employees, except yardmasters and other subordinate officers.

• • • • •

169 "(d) The fourth Division of the Board shall have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and over disputes involving employees of carriers over which jurisdiction is not given to the first, second, and third divisions."

Said bill, after two readings on the day of its introduction, was referred to the Senate Committee on Interstate Commerce, where it remained until the expiration of the 77th Congress without having been reported back to the Senate.

The foregoing stipulation made and entered into this 8th day of July, 1942.

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170 EXHIBIT 1.

171 IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—1603) • •

PETITION FOR MANDAMUS OR MANDATORY INJUNCTION.

Now come the petitioners and in support of their petition show the Court that—

1. By the terms of the Railway Labor Act as amended by Act of Congress June 21, 1934 (45 U.S.C.A. Section 153 (3)), there is created a quasi judicial or administrative Federal Board known as the National Railroad Adjustment Board, and by said Act it is further provided:

"'(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

'First division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

172 'Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

'Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by

the carriers and five by the national labor organizations of employees.

'Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.' "

2. The above named individual respondents are members of the Fourth Division of said National Railroad Adjustment Board so created and established, which said Board and the respective divisions thereof have and maintain headquarters and conduct their hearings in the City of Chicago, Illinois.

(3) The petitioners, R. V. Murphy, J. Besant and E. E. Wheeler are and were at all the times herein mentioned, members of the Railroad Yardmasters of America, a national labor organization of the employees of carriers, as the term is used in said Railway Labor Act, and were employed as yardmasters by the railroad carrier engaged in interstate commerce which is referred to in the exhibits mentioned hereafter and made a part hereof as therein
173 alleged; that yardmasters are not included in any of the classes of employees over whose disputes jurisdiction is by said Act given to the First, Second or Third Divisions, respectively, of said National Railroad Adjustment Board.

4. On March 21, 1938, the petitioner, Railroad Yardmasters of America, acting for and on behalf of the said R. B. Murphy, J. Besant and E. E. Wheeler, filed with the said Fourth Division of the National Railroad Adjustment Board an ex parte submission of disputes which had theretofore arisen between said respective petitioners and said carrier by whom they were employed as yardmasters, copies of which said ex parte submissions and statements of grievances are attached hereto and by reference made a part hereof as Exhibits "A," "B" and "C." Thereafter, on March 24, 1938, the said Fourth Division of the National Railroad Adjustment Board failed and refused to hear and adjudicate the said three ex parte submissions or cases and with respect thereto adopted and entered of record in their proceedings the following memorandum or resolution:

"In reference to the three cases filed with the Fourth Division of the National Railroad Adjustment Board by the Railroad Yardmasters of America *vs.* Southern Pacific Company (Pacific Lines) involving Yardmasters R. V. Murphy, J. Besant and E. E. Wheeler:

"Resolved That the Secretary be instructed to write a letter to Mr. C. H. Burchfield, president of the Railroad Yardmasters of America, and the Chief Operating Officer of the Southern Pacific Company (Pacific Lines), notifying them the Fourth Division has deadlocked on the question of assuming jurisdiction to receive and hear above mentioned cases."

Thereafter, and on the same date, the said R. B. Parkhurst, Secretary of said Fourth Division, pursuant to
174 the above memorandum or resolution, sent to C. H. Burchfield, president of the Railroad Yardmasters of America, a letter informing him of the failure and refusal of the said Fourth Division to hear and determine said ex parte submissions or disputes, a copy of which letter is attached hereto as Exhibit "D" and by reference thereto made a part hereof.

5. That by the terms of Section 3, First (r), 45 U.S.C.A., Section 153 (r), it is provided as follows:

"The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.";

that the National Mediation Board has in the past refused and now continues to refuse to appoint a neutral referee to the respective divisions of the National Railroad Adjustment Board upon their failure to render an award in a dispute submitted to them, when such failure or refusal is a failure or refusal to accept, docket or hear a submission or dispute or when the said failure or refusal results from a deadlocking on the question of assuming jurisdiction of the parties or subject-matter of said submission or dispute; that a request for the appointment of a neutral referee to said Fourth Division by any of the parties to the above-mentioned three submissions or disputes, or by the said Fourth Division or any member thereof, is therefore, useless and unavailing.

6. That the duty of the said Fourth Division to take

jurisdiction of and to hear and determine said disputes arises under the laws of the United States.

Wherefore, these petitioners pray that the Court will issue to the said Fourth Division and the individual members thereof named as respondents herein a writ of mandamus commanding them to accept, docket and hear
175 the said three submissions or disputes above mentioned and to assume and take jurisdiction thereof and enter awards therein on the merits of each of said controversies; or in the alternative that it issue to the said parties a mandatory writ of injunction directing and ordering the said Fourth Division and the individual members thereof to accept, docket and hear said disputes and to assume and take jurisdiction thereof and to render awards on the merits in each of said disputes.

Railroad Yardmasters of America,
R. V. Murphy,
J. Besant,
E. E. Wheeler,
Petitioners.
By .....
Their Attorneys.

176 EXHIBIT "D"

(Letterhead of National Railroad Adjustment Board, Fourth Division, Chicago, Illinois.)

March 24, 1938.

Mr. C. H. Burchfield, President
Railroad Yardmasters of America,
312 First National Bldg.,
Columbus, Ohio.

Mr. A. T. Mercier, General Manager
Southern Pacific Company,
65 Market Street,
San Francisco, Calif.

Gentlemen:

With reference to the ex parte submissions filed with the Fourth Division in the following cases:

Request for reinstatement of R. V. Murphy to his regular assigned position of yardmaster for the Southern Pacific Company (Pacific System) at their Carlin Yard, Carlin, Nevada.

Request for reinstatement of J. Besant to his regular assigned position of yardmaster for the Southern Pacific Company (Pacific Lines), at their Carlin Yard, Carlin, Nevada.

Request for reinstatement of E. E. Wheeler to his regular assigned position of yardmaster for the Southern Pacific Company (Pacific Lines) at their Phoenix Yard, Phoenix, Arizona.

The Fourth Division, in regular session today, instructed its Secretary to notify you that this Division has deadlocked on the question of assuming jurisdiction to receive and hear the above mentioned cases.

Yours very truly,
(Sgd.) R. B. Parkhurst,
Secretary, Fourth Division.

177 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—16031) * *

THE JOINT AND SEVERAL ANSWER OF RESPONDENTS E. J. HAMNER, CHARLES P. NEILL AND E. MURRIN TO THE ABOVE ENTITLED PETITION.

Now come E. J. Hamner, Charles P. Neill and E. Murrin, certain respondents in the above entitled cause and proceeding, and, jointly and severally, answering the petition in said cause and proceeding, aver that they are the duly selected, designated and acting members of the Fourth Division of the National Railroad Adjustment Board; that at the time of the institution of the above entitled proceeding, A. J. Hancock was a duly selected, designated and acting member of said Board and Division thereof; that subsequent to the institution of these proceedings, the said A. J. Hancock resigned as a member of said Board and Division, and that thereafter, on, to-wit; May 11, 1938, E. Murrin was duly selected, designated and appointed a member of said Board and Division thereof, to fill the vacancy therein created by the resignation of the said A. J. Hancock; that he is now a duly selected, designated and acting member of said Board and Division thereof; that he has been made a party respondent to this proceeding, and

a subpoena to him for his appearance has been issued
178 and although not served, he has entered his appearance herein, by his counsel; and said respondents, further answering said petition herein, jointly and severally admit each and every of the allegations of fact therein alleged and set forth, except as above, by their answer, qualified, respecting the membership on said Board and Division thereof at the time of the institution of these proceedings and thereafter; and said respondents, and each of them, aver that they, and each of them, are of the opinion that the Fourth Division of the National Railroad Adjustment Board has jurisdiction of the said three submissions or disputes of the said R. V. Murphy, J. Besant and E. E. Wheeler, referred to and mentioned in the petition herein, to the exclusion of the First, Second and Third Divisions of the said National Railroad Adjustment Board; and that said Fourth Division of said Board should accept, docket and hear said submissions or disputes, and make and enter awards therein.

E. J. Hamner,
Charles P. Neill,
E. Murrin,
By W. A. Morrow,
Their Attorney.

178½ United States District Court

Northern District of Illinois

Cause No. 16031 July 11, 1938.

Title of Cause.—United States ex rel Railroad Yardmasters of America, et al, *vs.* National Railroad Adjustment Board, Fourth Division, et al.

Brief Statement of Motion.—Motion of petitioners that petition for injunction be taken as confessed, and that decree awarding injunction be entered at respondents' cost.

Name of moving Counsel representing Robert Z. Hickmon.

Enter Order.
Draft.
W. H. H.

179 IN THE DISTRICT COURT OF THE UNITED STATES
(Caption—16031)

FINAL DECREE AND INJUNCTION

This cause coming on to be heard on this date upon the original petition of the petitioners, the joint and several answer of respondents E. J. Hamner, Charles P. Neill and E. Murrin, and on motion of petitioners that the said petition be taken as confessed as against the other respondents herein, and after hearing evidence herein and argument of counsel, and being fully advised in the premises, the court finds:

1. That the individual respondents constitute the Fourth Division of the National Railroad Adjustment Board, established and created by the laws of the United States, 45 U.S.C.A. Section 153 (3), and that they are presently the duly constituted, qualified and acting members of said Fourth Division.

180 2. That the said National Railroad Adjustment Board, so created and established, and the said Fourth Division thereof, have and maintain headquarters and conduct their hearings in the City of Chicago, State of Illinois.

3. That the petitioners, R. V. Murphy, J. Besant and E. E. Wheeler, are and were at all of the times mentioned in the original petition members of the Railroad Yardmasters of America, which was and is a national labor organization of the employees of carriers as the term is used in the Railway Labor Act (45 U.S.C.A. Section 153 (3)), and were employed as yardmasters by the Southern Pacific Company (Pacific System), a railroad carrier engaged in interstate commerce, and were so employed at all of the times mentioned in the original petition herein.

4. That in and by the terms of said Railway Labor Act, 45 U.S.C.A. Section 153, it is provided:

"'(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

'First division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This

division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

'Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

181 'Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

'Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.' ''

5. That yardmasters are not included in any of the classes of employees over whose disputes jurisdiction is by said Act given to the First, Second or Third Divisions, respectively, of said National Railroad Adjustment Board, nor do either of said last mentioned divisions of said Board have jurisdiction of disputes arising out of their employment in which yardmasters are involved.

6. That on March 21, 1938, the petitioner, Railroad Yardmasters of America, acting for and on behalf of the said petitioners, R. V. Murphy, J. Besant and E. E. Wheeler, filed with the said Fourth Division of the National Railroad Adjustment Board an ex parte submission of disputes which had theretofore arisen between said respective individual petitioners and said carriers by whom they were employed as yardmasters; copies of which said ex parte

submissions and statements of grievances are attached to the original petition herein and by reference thereto are made a part hereof as fully as if set out here verbatim.

7. That thereafter, on March 24, 1938, the said Fourth Division of the National Railroad Adjustment Board
182 failed and refused to hear and adjudicate the said three ex parte submissions or cases and with respect thereto adopted and entered of record in their proceedings a memorandum or resolution stating that the said Fourth Division had deadlocked on the question of assuming jurisdiction to receive and hear the said cases or disputes.

8. That the said Fourth Division of the National Railroad Adjustment Board had and now has jurisdiction to docket, hear and adjudicate said submissions, cases or disputes, and that on March 21, 1938, it became and was the duty of said Fourth Division and the individual members thereof to docket, hear and adjudicate the said three ex parte submissions or disputes.

9. That the National Mediation Board has in the past refused, and now continues to refuse, to appoint a neutral referee to the respective divisions of the National Railroad Adjustment Board upon their failure to render an award in a dispute submitted to them when such failure or refusal is a failure or refusal to accept, docket and hear a dispute or submission when the said failure or refusal results from a deadlocking on the question of assuming jurisdiction of the parties or subject matter of said submission or dispute; and that particularly, the said National Mediation Board has refused, and continues to refuse to appoint a neutral referee to the said Fourth Division of said National Railroad Adjustment Board, to hear and determine said three ex parte disputes lodged with the Fourth Division by the individual petitioners herein as above set forth, and that a request for the appointment of a neutral referee to said Fourth Division by any of the parties to the above mentioned three submissions or disputes is useless and unavailing.

183 10. That the duty and jurisdiction of the said Fourth Division of the National Railroad Adjustment Board, to take jurisdiction of and hear and determine said ex parte disputes or submissions, arises under the laws of the United States.

11. That the said E. J. Hamner, Charles P. Neill and E. Murrin have entered their general appearance herein

and have filed their joint and several answer to the original petition; that the said R. A. Walton, S. J. Hogan, R. B. Parkhurst, and the Fourth Division of the National Railroad Adjustment Board have each entered their general appearance herein.

12. That after the entry of the respective appearances of the said respondents, there was entered herein on May 9, on motion of Michael L. Igoe, United States District Attorney, and by agreement of the petitioners, an order extending the time for all respondents to plead to the petition, to May 25, 1938; that on May 24, 1938, there was entered herein an order extending the time for all respondents to plead, to and including June 25, 1938, and that such time has now expired with no pleading having been filed, except the answer of the three individual respondents as above set forth.

13. That as to the individual respondents R. A. Walton, S. J. Hogan, R. B. Parkhurst, and National Railroad Adjustment Board, Fourth Division, the original petition herein is taken as confessed for want of any plea, answer or demurrer thereto; and that after the entry of appearances of the other individual respondents, and on June 25, 1938, the time for said respondents to plead to the original petition expired, and that none of said respondents, except the said E. J. Hamner, Charles P. Neill and E. Murrin, have filed any plea, answer or demurrer to the original petition herein, and that as to all of said individual respondents who have entered their appearance and have not filed any plea, answer or demurrer, the said petition is taken as confessed.

184 14. That this Court has jurisdiction of all of the parties hereto and of the subject matter hereof, and that the equities in said cause are with the petitioners.

15. That all the allegations of the original petition are here found as findings of fact, the same as if the said allegations were here set out in full verbatim.

16. The Court finds the petitioners are entitled to the relief as prayed in the original petition and are entitled to the issuance by this Court of a mandatory writ of injunction, directing, ordering and commanding the said Fourth Division of the National Railroad Adjustment Board, and the individual members thereof, to accept, docket, take jurisdiction of, and hear said three ex parte submissions or disputes, lodged and filed with the said

Fourth Division by the petitioners as above set forth, and to render awards on the merits in each of said disputes.

16. The Court further finds each and every of the above and foregoing as conclusions of law, and the above and foregoing findings of fact and conclusions of law are by reference thereto included in and made a part of this final decree.

It Is, Therefore, Ordered, Adjudged and Decreed That the Fourth Division of the National Railroad Adjustment Board, C. W. Deal, R. B. Parkhurst, A. J. Hancock, R. A. Walton, Charles P. Neill, E. J. Hamner, S. J. Hogan and E. Murrin, individually, and as members of said Fourth Division of the National Railroad Adjustment Board, and their successors on such division, and their agents, officers, attorneys and servants, be, and they hereby are enjoined and commanded to take jurisdiction of, to docket, hear, determine and enter awards on the merits in the said three ex parte submissions or disputes, heretofore filed with
185 said Fourth Division of the National Railroad Adjustment Board, on or about March 21, 1938, by the petitioner Railroad Yadrmasters of America, acting for and on behalf of the said R V. Murphy, J. Besant and E. E. Wheeler, petitioners, and that the terms of this final decree and injunctional order shall be perpetually in effect.

It Is Further Ordered that the sum of $20.06 taxed herein as the costs of the petitioners, be paid by the said respondents to the petitioners and that they have execution therefor.

Holly,
Judge, District Court.

Entered this 11th day of July, 1938.

186 EXHIBIT 2.

187 Order of Railway Conductors
of America

August 25, 1938.

Mr. J. C. Rankine,
Asst. to Vice Pres.,
Great Northern Ry.,
St. Paul, Minnesota.

Dear Sir:

Referring to Secretary Parkhurst's of the Fourth Division letter of August 18, regarding the yardmaster cases of V. E. Benjamin and M. L. Nagle for loss of earnings by reason of reduction in force November 1, 1937, in which he advised that the claim has been given Docket Case No. 23 and oral hearing on same set for 10 A. M. (Chicago time), Tuesday, September 13, 1938.

Permit me to advise that it is the position of our organization that this case is not properly a Fourth Division case, as we regard it properly under the jurisdiction of the First Division, whose members on both sides of the table are in direct contact with the agreements covering yard services. This division has already decided some yardmaster cases, and our organization has a representative on this division. This letter is written as a formal request that you please withdraw any papers you have sent to the Fourth Division in connection with these claims, and will you please join me in a submission of claims to the First Division, and oblige, advising.

Yours truly,
(Sgd.) R. E. Landis,
Chairman.

REL:L
cc R. B. Parkhurst,
J. A. Phillips,
G. H. Oram.

188 EXHIBIT 3.

189 Great Northern Railway Company

St. Paul, Minnesota,
August 30th, 1938.

Mr. R. E. Landis, General Chairman,
Order of Railway Conductors,
Saint Paul, Minnesota.

Dear Sir:

Referring to your letter of August 25th, in regard to submission of the claims of Yardmasters V. E. Benjamin and M. L. Nagle, which were sent to the Fourth Division of the National Railroad Adjustment Board.

In view of the existing injunction issued by Judge Holly on July 11th, and in further view of the resolution adopted by the Fourth Division on August 18th, I do not see how I legally can agree to withdrawal of such case from that division nor submission of it to the First Division.

I presume that as complainant, you are at liberty to withdraw the complaint, and I presume that you also have the right to submit the complaint as an ex parte matter to the First Division for their consideration if you so desire.

However, I am not at liberty to join you in such submission.

(Sgd.) J. C. Rankine.

190 EXHIBIT 4.

191 Order of Railway Conductors
of America

Mr. R. B. Parkhurst,
Secretary, Fourth Division,
National Railroad Adjustment Board,
220 S. State Street,
Chicago, Illinois.

Dear Sir:

I am in receipt of a letter dated August 26, addressed to Mr. Rankine and me, in connection with yardmasters case, Great Northern Railroad, covered by your Board's Docket No. 23.

It is my desire to withdraw this case and formal notice of its withdrawal is hereby given.

Yours truly,
(Sgd.) R. E. Landis,
General Chairman, O. R. C.,
Great Northern Railroad.

Copy to:
Mr. J. C. Rankine.

192 EXHIBIT 5.

193 National Railroad Adjustment Board
Fourth Division
Chicago, Illinois

September 2, 1938.

Mr. J. C. Rankine, Asst. to Vice Pres.,
Great Northern Railway Company,
Room 912, Great Northern Bldg.,
St. Paul, Minn.

Dear Sir:

We are in receipt of a letter from Mr. R. E. Landis, General Chairman, O. R. C., Great Northern Railway, dated at Chicago, Illinois, September 1, 1938, reading as follows:

"I am in receipt of a letter dated August 26, addressed to Mr. Rankine and me, in connection with yardmasters

case, Great Northern Railroad, covered by your Board's Docket No. 23.

It is my desire to withdraw this case and formal notice of its withdrawal is hereby given."

Inasmuch as this case was submitted jointly, please advise if you concur in request of petitioner for withdrawal.

Yours very truly,
(Sgd.) R. B. Parkhurst,
Secretary, Fourth Division.

cc Mr. R. E. Landis, General Chairman,
Order of Railway Conductors,
1014 Pioneer Bldg.,
St. Paul, Minn.

194 EXHIBIT 6.

195 Great Northern Railway Company

Saint Paul, Minnesota,
September 3rd, 1938.

Mr. R. B. Parkhurst,
Secretary, Fourth Division,
National Railroad Adjustment Board,
Chicago, Illinois.

Dear Sir:

I am in receipt of a copy of letter to you from General Chairman Landis of the Order of Railway Conductors notifying you of their desire to withdraw case covered by your Docket No. 23.

Inasmuch as the organization is the complainant in this case, the carrier, of course, has no objection to their withdrawal of such complaint.

(Sgd.) J. C. Rankine.

cc Mr. R. E. Landis.

service, during which time I also worked in a railroad yard in France as a yardmaster, trainmaster and assistant superintendent.

The Court: Q. When did you start as a yardmaster?

A. 1911.

The Court: All right.

The Witness: 1928 to 1930 as a trainmaster of the Chicago Division at Milwaukee, Wisconsin. 1930 to 1937 again as a yardmaster. In 1937 to 1939 as a trainmaster. 1939 to 1941 as assistant superintendent, Chicago Terminals, and from that date up to the present time as superintendent.

219 Mr. Smith: Q. Mr. Kiesele, did you hear Mr. Green testify?

A. I did.

Q. Did you hear him define certain terms in response to my questions?

A. I did.

Q. Did you hear his cross-examination?

A. I did.

Q. If you were asked the same questions by me and by counsel on the other side with reference to the meaning of these various terms, would you give the same answers?

A. I would.

Mr. Smith: That is all. I will elaborate that, if the court is interested.

The Court: That is a short way of putting it.

Mr. Hassenauer: No cross-examination.

Mr. Smith: That is all.

(Witness excused.)

220 MORRIS E. SOMERLOTT, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Smith.

Q. Will you state your name, residence and occupation, please?

A. Assistant manager of personnel for the Southern Pacific Company, Pacific Lines, San Francisco, California.

Q. How long have you been engaged in railroad service?

A. I was first employed by the Southern Pacific Company.

Q. I am not asking you to state it, sir; just the date, since when?

A. August, 1915.

Q. Will you state very briefly what that experience has consisted of since that date?

A. Yardmaster's messenger boy, call boy, yard clerk, warehouseman, brakeman, conductor, trainmaster and my present position.

Q. Now, when I refer to railroad service, I intended to cover your service both for the railroad managements and for the employees. You might make it complete
221 and just refer to your service as a representative of the employees.

A. While I was in train service I was the local chairman of the Trainmen, Fresno, California; also general secretary, secretary of the genera' grievance committee of the Southern Pacific Lines for the Brotherhood of Railroad Trainmen.

Q. When did you first begin to work around railroad yards?

A. 1915.

Q. Did you hear the testimony of Mr. Green, who preceded you on the stand?

A. Yes, sir.

Q. Did you hear him define certain terms in his testimony, in response to my questions?

A. Yes, sir.

Q. Did you hear his testimony on cross-examination in response to Mr. Hassenauer's questions?

A. Yes, sir.

Q. If you were asked the same questions which I and Mr. Hassenauer asked Mr. Green, in reference to these various terms and definitions, you would give the same answers in all respects?

A. I would, sir.

222 Mr. Smith: That is all.

Cross-Examination by Mr. Hassenauer.

Q. Mr. Somerlott, you never were a yardmaster, were you?

A. No, I was not a yardmaster.

Q. You testified you were on the, or that you were the local chairman of the Brotherhood of Railroad Trainmen at one time?

196 EXHIBIT 7.

197 National Railroad Adjustment Board

First Division

Chicago, Illinois

August 28, 1941

Dockets 6404
10665
12101
12277
12278
12280
12294
12295
11801

Messrs. Fred W. Lewis,
Wm. Bishop,
Paul M. Carter,
R. E. Edrington,
F. J. Williams

Gentlemen:

On the 11th day of July, 1938, a final decree and injunction was entered by Honorable William H. Holly, Judge of the District Court of the Northern District of Illinois, Eastern Division, in the case entitled United States, ex rel, Railroad Yardmasters of America, R. V. Murphy, J. Besant, E. E. Wheeler, *vs.* National Railroad Adjustment Board, Fourth Division, C. W. Deal, Chairman, R B. Parkhurst, Secretary, A. J. Hancock, R. A. Walton, Charles P. Neill, E. J. Hamner, S. J. Hogan, and E. Murrin, Chancery No. 16031. Said decree specifically enjoined and commanded that the Fourth Division of the National Railroad Adjustment Board and the members of that division individually take jurisdiction of, hear, determine and enter awards on the merits on three ex parte submissions or disputes of R. V. Murphy, J. Besant and E. E. Wheeler, employed as yardmasters. That decree provided in part:

"That yardmasters are not included in any of the classes of employees over whose disputes jurisdiction is by said act (Railway Labor Act, 45. U.S.C.A., Sec. 153) given to the First, Second or Third Divisions, respectively of said National Railroad Adjustment Board, nor do either of said last mentioned divisions of said board have jurisdiction of disputes arising out of their employment in which yardmasters are involved."

There are now pending before the First Division of the National Railroad Adjustment Board the following submissions or disputes arising out of employment in which yardmasters are involved:

Docket No. 6404—Order of Railway Conductors *vs.* Great Northern Railway Company.

Docket No. 10665—Brotherhood of Railroad Trainmen *vs.* Southern Pacific Lines in Texas and Louisiana.

198 Dockets 12101
12277
12278
12280
12294
12295

Brotherhood of Railroad Trainmen
vs.
Southern Pacific Company
(Pacific Lines)

In view of the said final decree and injunction of July 11, 1938, the carrier members of the First Division hereby give notice that they will not agree to set the said cases for hearing; and since it appears that by the terms of the amended Railway Labor Act as construed by the District Court of the Northern District of Illinois, Eastern Division, jurisdiction over the subject matter of each of the aforecited dockets is vested in the Fourth Division, we propose that these cases and similar disputes and submissions arising in the future be docketed with the Fourth Division of the National Railroad Adjustment Board, and that said Fourth Division hear, determine, and enter awards thereon.

There is also at present pending in the First Division Docket 11801—Trainmen *vs.* Minneapolis, St. Paul & Sault Ste. Marie Railway—involving the seniority dating of a yardmaster as such, and upon which hearing has been waived. Jurisdiction over the subject matter of this docket we also maintain is vested in the Fourth Division, and not the First Division. Consequently, we will not participate in any consideration of the merits, and propose that said docket also be filed with the Fourth Division, and that said

Fourth Division hear, determine, and enter an award thereon.

Yours very truly,
(Sgd.) T. K. Faherty,
For the Carrier Members,
First Division.

Copies to:

Mr. T. S. McFarland, Secretary, First Division: To be attached to and made a part of the division's master files on these nine dockets.

Mr. R. A. Walton, Chairman, Fourth Division.

Mr. E. J. Hamner, Vice Chairman, Fourth Division.

Mr. R. B. Parkhurst, Secretary, Fourth Division

199 And on the same day, to wit, the 10th day of October, 1944, there was filed in the Clerk's office of said Court a certain Transcript of Testimony, in words and figures following, to wit:

200 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—3788) * *

Stenographic Transcript of proceedings had and evidence adduced at the trial of the above-entitled case before Hon. William H. Holly, Judge of said District Court, in the United States Courthouse at Chicago, Illinois, on Monday, the 3d day of January, A. D. 1944, commencing at 10 A. M.

Appearances:

Mr. Craven Shuttleworth and Mr. Everett Gordon, on behalf of the plaintiff.

201 Messrs. Sidley, McPherson, Austin & Burgess, by Mr. Douglas F. Smith and Mr. Robert Diller, and Mr. Hallan Huffman, on behalf of certain defendants.

Mr. Leo J. Hassenauer, on behalf of Defendants F. J. Williams, William Bishop, Paul M. Carter, R. E. Edrington and Fred Lewis.

Messrs. Poppenhusen, Johnston, Thompson & Raymond, by Mr. Anan Raymond, on behalf of Railroad Yardmasters of America, intervener.

203 The Court: All right. You may proceed with such evidence as you wish. I suppose the first thing is the stipulation?

Mr. Shuttleworth: I have assumed, your Honor, that without formally being offered in evidence, the stipulation is before the court.

Mr. Smith: I think it ought to be offered.

Mr. Shuttleworth: Do you have any objection?

The Court: I think it ought to be offered. It is not in evidence unless it is offered. I don't know whether it is necessary to read the entire stipulation at this time. Do you wish to do that?

Mr. Smith: I don't think it is necessary to do that.

The Court: I don't think so.

Mr. Shuttleworth: The original stipulation is filed.

The Court: That may be marked and accepted in evidence.

Mr. Smith: That stipulation shows on its face, doesn't it, that it has been executed by counsel for all the parties in the case and we jointly offer it?

Mr. Shuttleworth: That is so.

204 The Court: Jointly—Exhibit 1.

(Said document, so received in evidence, was marked Exhibit 1.)

205 Mr. Smith: Now, your Honor, we have a witness who is a railroad officer, whom we desire to call to testify on what this word means, what these words mean in the railroad vernacular, on the theory and on the basis that when Congress uses certain words in a statute that are taken from a technical field, Congress is presumed to have used those words in the sense they are generally used.

The Court: Yes.

Mr. Smith: And I am sure your Honor does not want authority cited on that.

207 The Court: You may go ahead.

Mr. Smith: I will call my witnesses.

I just wanted to respond to this suggestion that they have been trying to find out what we are going to put in evidence. That injects an element of mysticism in the case. We had a stipulation that it would cover all the evidence that was to be offered. We said we would—

The Court: I will let any evidence in they may decide they want to offer at any time, and be prepared

208 to offer it subject to the limitations.

THEODORE L. GREEN, called as a witness on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Smith.

Q. Will you state your name, residence and occupation, please?

A. Theodore L. Green, general manager, Indiana Harbor Belt, C. R. & I. Railroad; residence, Chicago, Illinois.

Q. How long have you been employed in that capacity?

A. Since September 1, 1943.

Q. Will you just with great briefness state where the Indiana Harbor Belt is located and what it does?

A. It is located in the Chicago metropolitan area, Chicago switching district, and it handles traffic between the Western lines and Eastern lines, or vice versa, to various industries in this locality, and it has a belt line, in other words, as between the various railroads.

Q. Does it operate a number of yards, as that term is used in railroad parlance?

A. Yes, sir.

209 Q. What yards does it operate?

A. Well, we have yards located at Norpaul, Illinois, Argo, Illinois, Blue Island, Illinois, Calumet City, Illinois, Gibson, Indiana, Michigan Avenue, or Indiana Harbor, Indiana.

Q. What, in a general way, and briefly, are your duties as general manager, to operate the road, subject to the president and the board of directors?

A. Yes, sir.

Q. Very briefly, will you tell the court what your railroad experience has been, not itemizing the various employments you have had too finely, but just in a general way summarize your experience?

A. I was employed by the Michigan Central as a telegrapher in 1902, then raised to a train dispatcher, chief dispatcher, assistant trainmaster, trainmaster, assistant superintendent, superintendent, assistant general manager and general manager, where I am at the present time.

Q. Did you say when you began your railroad employment?

A. March, 1902.

Q. You have been continuously employed in railroad service since that time?

210 A. Yes, sir.

Q. During that period, will you state whether or not the term "yard service employees" has had a certain meaning in the railroad field? I am not asking you to state what the meaning is; I am asking you if it has had a certain definite meaning?

A. It refers to certain employees who make up and break up trains in yards within defined limits.

They also do other switching of cars, placing and pulling of cars at industries within those yards; namely, engineers, firemen, conductors or engine foremen, yard brakemen, switchmen or helpers, as they are termed.

Q. Now, has it had that general meaning throughout the period of your experience and to your knowledge?

A. Yes, sir.

Q. Does the term as you have defined it include yardmasters?

A. No, sir.

Q. Can you tell the court what the history of that term is, or explain to the court how it came to have that meaning that you have ascribed to it?

A. Well, for many years, or for as long as I can remember, employees in yard service who had the making

211 up and breaking up of trains and the other switching as referred to before have always had a different rate of pay than employees engaged in a similar service and working with, outside those definite yard limits, or yards.

Q. You say for many years, or as far back as you can remember, that embraces a period prior to 1934-1935, does it?

A. Yes, sir.

Q. For many years prior?

A. Yes, sir.

Q. Is there any term, or are there any terms in the railroad field that are equivalent to, or have the same meaning as the term "yard service employees"?

A. Yard crews, or yard men.

Q. You mean by that answer that—

A. They would call them yard crews or yard men—

Q. that the term "yard crews" and "yard men" are the equivalent of the term "yard service employees," is that what you mean?

A. Yes, sir.

Mr. Smith: I think that is all.

212 *Cross-Examination by Mr. Hassenauer.*

Q. Mr. Green, in giving the class of employees in a yard who operate with the work of a yardmaster you used the term "switchmen" among the terms "engineers, firemen, conductors, engine foremen, yard brakemen": By "switchmen," do you mean switch tenders?

A. No, sir.

Q. Switch tenders are also employed in the yard service of a railroad, are they not?

A. Yes, sir.

Q. You do not mean, then, by the term "switchmen" to include the term "switch tenders"; that is a separate classification of employees, is it not?

A. Yes, sir.

Q. Have you ever been yardmaster?

A. No, sir.

Q. Have you ever appeared before the First Division of the National Railroad Adjustment Board in sustaining the position of a carrier in any dispute involving a yardmaster with your road?

A. No, sir.

Mr. Smith: May I hear that question?

(Question read.)

213 Mr. Smith: May I object to that as not proper cross-examination and irrelevant?

The Court: It might have a bearing on the question of his knowledge.

Objection overruled.

Mr. Hassenauer: Q. How many miles of tracks does the Indiana Harbor Belt occupy?

A. Well, approximately 45 miles in length.

Q. That is an exceptional road in this district, is it not?

A. Yes, sir.

Q. Approximately how many yardmasters are employed by the Indiana Harbor Belt Railroad?

A. Well, let's see; I would say approximately, I would say in the neighborhood of sixty yardmasters, approximately.

Q. Do you know whether or not those yardmasters are affiliated with any of the standard railroad labor organizations?

A. They are.

Q. Which organizations?

A. Yardmasters of America.

Q. Railroad Yardmasters of America?

A. Yes, sir.

213½ Q. With headquarters at Columbus, Ohio?

A. I would not state where their headquarters are.

Q. At any rate, the intervener in this case?

A. As I understand it, they are; yes sir.

Q. Will you tell us whether or not, Mr. Green, yardmasters work within the same defined limits as the yard men?

A. Yes, sir.

Q. Thus yard foremen have a different rate of pay than the helper?

A. Yes, sir.

The Court: Yard foremen, I take it, is synonymous with yardmaster, yardmasters and yard foremen?

Mr. Smith: No.

The Witness: Not in the same category.

Mr. Smith: Q. Just explain that, Mr. Green: The engine foreman is about the same as a conductor out on the line? Mr. Hassenauer and I are not in any disagreement on that.

The Court: Mr. Hassenauer used the term "yard foreman" and I wondered if that meant "yardmaster."

The Witness: He is the conductor; in other words, that has the immediate supervision of that particular crew that is working with him.

214 Mr. Hassenauer: Q. As a matter of fact, wouldn't you say that the work of a yardmaster is more closely allied to that of the man engaged in train and engine service than it is with any other group or class of employees in the yard?

A. Yes, sir.

Mr. Hassenauer: That is all.

Redirect Examination by Mr. Smith.

Q. Mr. Green, I find from one of Judge Holly's questions that I had not developed, perhaps, as I should have, the relationship between the work done in the yard and that done out on the line. Now, can it be said generally that the switchmen or brakemen in the yard does about the same category of work as brakemen out on the line?

Mr. Hassenauer: I object to that, your Honor. I think it is immaterial. I don't think it is proper redirect examination.

The Court: I am inclined to let it go in.

Mr. Smith: I will withdraw the question. I thought it was not clear. If counsel thinks it is not important, I will pass it.

215 Q. Mr. Hassenauer asked you if the Indiana Harbor was an exceptional line. Is it exceptional in that for your mileage you have a great deal more of work than other railroads?

A. Yes, sir.

Q. As a matter of fact, the Indiana's service is very largely done in yards, isn't it?

A. Well, it comes within the yard rules entirely. That is, we don't define any road service or yard service on the Indiana Harbor Belt, in particular. The yard service rule applies. A different rate of pay comes in where you call one "transfer service" and the other "yard service."

Q. Mr. Hassenauer also asked you if the work of the yardmaster was not more closely aligned with the work of the yard men than with any other category of work.

Mr. Hassenauer: That is not what I asked. I don't want to interrupt.

Mr. Smith: I am just identifying the question.

Q. Now, the yardmaster's work is pretty closely identified with his clerks and his car checkers and his yard checkers and his weighmasters, isn't it?

A. Yes, sir.

Mr. Smith: That is all.

216 *Examination by Mr. Raymond.*

Q. Mr. Green, this is not cross-examination, at all, but it is to clear the record up in one particular. Do you know the name of the yardmasters' organization that represents the yardmasters on the Indiana Harbor Belt?

A. Yardmasters Association of America.

Q. In fact, it is the Railroad Yardmasters of North America, is it not?

A. Yardmasters Association of North America.

Q. Railroad—

A. I will stand corrected on that. I wouldn't say definitely.

Q. At all events, it is not the Railroad Yardmasters of America, the intervener here?

The Witness: All right.

Recross Examination by Mr. Hassenauer.

Q. Do you know that as a fact?

A. I might look at one of my agreements, or something of that sort.

Q. You don't know?

A. I would say that—I wouldn't say positively.

217 Mr. Hassenauer: All right.

The Court: Wait a minute. I suppose that is a matter upon which the parties can agree.

Mr. Smith: I would think so. I am amazed that there is any difference of opinion about it.

The Court: Can the parties agree on it as a fact that can be established without difficulty?

Mr. Hassenauer: I haven't seen the agreement.

Mr. Smith: I am sure we can.

The Court: I don't think it is a matter of any importance.

Mr. Smith: I don't see that it is. Mr. Hassenauer brought it up. Maybe we ought to clear it up.

That is all I have. That is all, Mr. Green.

(Witness excused.)

EDMUND G. KIESELE, called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Smith.

Q. Will you state your name, residence and employment, please?

A. Edmund G. Kiesele, 1724 North Oak Park Avenue.

218 Q. Chicago?

A. Chicago, Illinois. Superintendent, Chicago Terminals, Milwaukee Railroad.

Q. Will you very briefly state what your railroad experience has been?

A. I started my railroad career in June of 1907 as a call boy, and following that I worked as a yard clerk, a clerk in the freight house, dispatcher's office and superintendent's office. This service was during 1907 to 1911, approximately four years.

From 1911 until 1928 I worked as a yardmaster, with the exception of two years in 1918 and 1919, when I was in the

A. Yes, sir.

Q. The Brotherhood of Railroad Trainmen at that particular time represented yardmasters on your road?

A. They did not represent yardmasters.

Q. They do now on your road?

A. No, sir.

Q. Who has the agreement on the Southern Pacific?

A. Railroad Yardmasters of America.

Q. That is the intervener in this case?

A. To my knowledge, coming into the court room, yes, sir.

Q. As local chairman of the Trainmasters at that particular time, did you come in contact with employees performing yardmasters' duties?

A. Yes, sir.

223 Q. The work of yardmasters, that yardmasters perform in the yard, was closely allied to those of the train and enginemen, was it not?

A. In a supervisory way.

Q. More so than it would be with the clerical staff, or the telegraphers, in the way of breaking up and making up of trains in the yards?

A. No, I would not say more so. He was a yard supervisor. He would have jurisdiction over the clerks and the switchmen.

Q. Just how much of a clerical duty is performed in the yard?

A. Well, the car records of in and outbound waybills, manifests, wheel reports; there are a multitude of reports.

Q. Are they actually employed in the yard, or employed outside of the yard, these clerks?

A. They are in the yard, inside the limits.

Q. Are you familiar with the operation of the National Railroad Adjustment Board?

A. I don't quite understand your question.

Q. Have you ever appeared before any division of the Adjustment Board on behalf of your road?

Mr. Smith: That is objected to as immaterial.

224 The Court: That may be. I will let it go in and determine later.

A. Not representing the railroad, no.

Mr. Hassenauer: Q. In what capacity did you appear?

A. As representative of the employees.

Q. What division did you appear before?

A. Division 1.

The Court: I didn't understand.

A. Division 1.

Mr. Hassenauer: Q. That was when you were local chairman of the Brotherhood of Railroad Trainmen?

A. When I was general secretary of the General Grievance Committee.

Q. Of the Brotherhood of Railroad Trainmen?

A. Yes, sir.

Q. Mr. Somerlott, can you tell us where the disputes involving yard clerks of the Southern Pacific Lines are referred to, to what division of the Adjustment Board?

A. Division 3.

Mr. Hassenauer: That is all.

Mr. Smith: That is all.

(Witness excused.)

225 Mr. Smith: That completes our oral testimony.

I might say that paragraph 2 of the stipulation reads as follows:

"It is further stipulated that—" maybe your Honor would just like to glance at that paragraph 2.

The Court: Yes.

(A document was handed to the court.)

Mr. Smith: Have you noted that, your Honor?

The Court: Yes.

Mr. Smith: Now, by such reference to, and identification, we desire to put into the record certain awards and certain submissions, and I shall for the purpose of the record so refer to and identify those submissions and awards.

Award 1464, docket 1428—

Mr. Hassenauer: Pardon me, Mr. Smith. Are those awards attached to the answer filed by the carrier members of the Board as an appendix to the answer or something else?

Mr. Smith: They include those, as I recall, and include a number of additional ones.

Mr. Hassenauer: You are giving the additional ones?

Mr. Smith: I am identifying and referring to certain
226 submissions and awards within the language of paragraph 2.

The Court: I suppose those are included in the answer as well as some others, is that it?

Mr. Smith: Yes; a rather large number of others.

The Court: This is a matter that goes into the record: I should be going up to the judges' meeting and—

Mr. Smith: Yes.

The Court: I don't see any reason why you should not proceed to put them in in my absence. We will recess until two o'clock.

Mr. Hassenauer: Thank you.

Mr. Smith: Have you a copy of that?

The Court: I suppose there is no controversy over that.

Mr. Smith: We won't get into any of the controversial phases of it.

Award 1464, docket 1428, First Division awards, First Division, N.R.A.B., Vol. 8, Page 187.

Award 1728, docket 3312, First Division, O.P.C.I.T., Vol. 9, Page 414.

Award 2065, docket 3684, First Division, O.P.C.I.T., Vol. 11, Page 966.

Award 3055, docket 5751, First Division, Vol. 17, Page 330.

Award 3609, docket 5994, First Division, Vol. 21, Page 35.

Award 4466, docket 8881, First Division, Vol. 26, Page 370.

Award 5816, docket 5518, First Division, Vol. 34, Page 89.

Award 7355, docket 11023, First Division, Vol. 46, Page 383.

Award 67, docket 68, Fourth Division, Vol. 1, Page 580.

Do you gentlemen accept that as a sufficiently specific reference and identification to—and in each instance these are from the reports of N.R.A.B.—is that sufficiently specific?

Mr. Smith: And the following submissions, submissions in Docket 6406, First Division; submissions in Docket 6837, First Division; submissions in Docket 11801, First Division.

That completes the awards. That is all.

Mr. Raymond: I am going to go over these. I will wait until after recess. I think they are things of which the court would take judicial notice.

229 Mr. Smith: Your Honor, we have referred to the awards and submissions we wanted to put into the record, and counsel said that they had been sufficiently identified for that purpoes.

May we understand, then, pursuant to paragraph 2 of the stipulation they are in evidence?

The Court: Yes.

Mr. Smith: This, I think, does not come within paragraph 2 of the stipulation.

This is an excerpt from a decision of the Interstate Commerce Commission in Ex Parte No. 106, in the six-hour investigation, officially reported in 190 I.C.C. 750, dated
230 December 6, 1932. Now, there is just an excerpt from that report that we should like to refer to here, and I think the court will take judicial knowledge—

The Court: Oh yes.

Mr. Smith: (continuing) of the reports of the Interstate Commerce Commission, but for convenience may I hand your Honor the excerpt?

The Court: Yes. It may be well for the sake of convenience to put in evidence all these things so that they will be in the file when I come to consider the case.

Mr. Smith: All right, your Honor.

231 Mr. Smith: I have here the submissions and awards that were referred to by us, and that are now in the record, and I had intended, your Honor, to make some reference in the discussion of the case to these, of course, and that is the reason they are offered.

234 Mr. Smith: I offer in evidence Defendants' Exhibits 1, 1-A to 1-H, inclusive, and Defendants' Exhibit 2.

The Court: They may be received in evidence.

(Said documents so offered and received in evidence were marked as Defendants' Exhibits 1, 1-A to 1-H, inclusive; and Defendants' Exhibit 2, and are in words and figures as follows, to-wit:)

235 Mr. Smith: If your Honor, please, here are three excerpts from awards or submissions that are set up in the defendants' answer, and I think they are not now in evidence, and I want to offer them in evidence again under this paragraph 2 of the stipulation. I would like to have these three excerpts marked as Defendants' Exhibits 3, 3-A and 3-B.

The Court: They may be received in evidence.

(Said documents so offered and received in evidence were marked as Defendants' Exhibits 3, 3-A and 3-B, and are in words and figures as follows, to-wit:)

236 Mr. Smith: That is our case and we close.

The Court: Any rebuttal?

Mr. Raymond: Just some additional documents under the reservation of right in the stipulation.

Mark these Intervener's Exhibits 1 to 6.

(Documents so marked.)

Mr. Smith: Mr. Shuttleworth, did you have an opportunity to examine the documents I handed you before the noon hour?

Mr. Shuttleworth: Yes, I did.

Mr. Smith: Is there any dispute about their being what they purport to be?

Mr. Shuttleworth: I am not sure of the purpose, what they are offered for.

Mr. Smith: That is something else again. You are not raising any questions about their being genuine excerpts from the documents?

Mr. Shuttleworth: I haven't had a chance to examine them.

The Court: We will assume that they are subject to check.

Mr. Raymond: In addition to the first five marked Intervenor's Exhibits 1 to 5, both inclusive, Intervener's
237 Exhibit 6 is Circular 76-2. I didn't have a copy of that to submit to you before adjournment. I just borrowed one from Mr. Smith. I will have to get that back and substitute a copy; also get a copy into the hands of counsel for the plaintiffs, subject to the plaintiff's check, and I would like to offer in evidence Intervener's Exhibit 6.

The Court: It is just a question of the authenticity of the document?

Mr. Raymond: A question as to the purpose for which they are offered which, of course, can be stated in the briefs and the argument.

The Court: Admitted subject to your check.

(Said documents so offered and received in evidence were marked as Intervener's Exhibits 1 to 6, both inclusive, and are in words and figures as follows, to-wit:)

238 Mr. Smith: I thought it was clear, but one of my colleagues was not certain whether the court admitted in evidence all of these exhibits?

The Court: Yes; I did admit them all in evidence.

Mr. Smith: Some question was raised by Mr. Hassenauer as to what organization it is that represents yardmasters on the Indiana Harbor Belt.

I might say to you, Mr. Hassenauer, that Mr. Green has stated to us that the organization is not the intervener here, but the Railroad Yardmasters of North America. He is here and has the agreement.

Would you care to interrogate him on that?

Mr. Hassenauer: Let him remain where he is and I would like to ask him one question.

Mr. Green, has that agreement been filed with the National Mediation Board in accordance with Section 5-E of the Railway Labor Act?

Mr. Green: Yes, sir.

Mr. Hassenauer: I didn't find it in the appendix to the Board report. I just wanted to know for my own information.

Mr. Raymond: The question of fact is cleared up.

The Court: It will be taken that Mr. Green has so testified.

239 Mr. Hassenauer: That is all right. There is no question about it that is this agreement with the other organization.

I would like to have Mr. Kiesele recalled for one question.

The Court: All right.

Mr. Hassenauer: He testified previously and I have one question I would like to ask on cross-examination, if I may.

The Court: All right.

EDMUND G. KIESELE, recalled as a witness herein, having been previously sworn, resumed the stand and testified further as follows:

Recross Examination by Mr. Hassenauer.

Q. You are the same Mr. Edmund G. Kiesele who was sworn and testified in this proceeding this forenoon?

A. Yes, sir.

Q. Are you familiar with the promotion of yardmen from yard service employees on your railroad?

A. Yes, sir.

Q. Are yardmasters promoted from that yard serv-
240 ice employees on your road?

A. They are promoted from so-called yardmen.

Q. Yardmen?

A. Yes, sir.

Q. That is as a result of a schedule agreement, is it not?

A. Yes, sir.

Q. And following their promotion to yardmasters, do they retain their seniority from the craft or class from which they were promoted?

A. They do.

Mr. Hassenauer: That is all.
Mr. Smith: No questions.
Mr. Raymond: Just a moment, please. All right.

Redirect Examination by Mr. Smith.

Q. You are testifying as to what the situation is on the Milwaukee?
A. Yes, sir; and Chicago Terminals.
Q. Do you know whether the same situation or a different situation exists on other railroads?
A. No, I do not.
Mr. Smith: That is all.
241 Mr. Hassenauer: Thank you.
(Witness excused.)
242 Mr. Shuttleworth: I would like to call Mr. Nemitz, in rebuttal, your Honor.
The Court: Very well.

F. H. NEMITZ, called as a witness on behalf of the plaintiffs, in rebuttal, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shuttleworth.

Q. Your name is F. H. Nemitz?
A. Yes, sir.
Q. Where do you reside?
A. Cedar Rapids, Iowa.
Q. What is your present position, business or occupation?
A. Senior vice president, Order of Railway Conductors.
Q. When did you first enter railroad work?
A. March, 1903.
Q. Just tell the court the experience you have had, both as an employee and as a representative on various boards, and offisially representing the Order of Railway Conductors, from the time you entered railroad service to the present time.
243 A. I entered the railroad service as a brakeman on the Southern Pacific. I worked in various capacities on different railroads, sometimes as a shop man, as a laborer as a mechanic helper, as a switchman, as a fore-

man, brakeman, as a conductor; various kinds of train service.

I served the Order of Railway Conductors as chairman of the local committee, as vice chairman of the general committee, as general chairman, or chairman of the general committee.

I served as vice president for about twenty-one years and as senior vice president about two years.

I prosecuted claims before the various bureaus, Bureau 3 in particular, of the United States Railroad Labor Board, which was set up under the Transportation Act of 1920.

I also prosecuted claims from different railroads, before the full board composed of nine persons, three representing the railroads, three representing the public and three representing the organization.

I also served as a member of the Western Train Service Board for about two and a half years, which was composed of eight members.

244 I also helped establish and served on the Southwestern Train Service Board as a member of it for seven or eight months.

I also served on the Board up in Canada and I put in a couple of weeks as a substitute member of the present Train Service Board, Division No. 1, First Division, National Railroad Adjustment Board.

Q. As a result of your experience, have you had occasion to consider claims of and become familiar in a general way with yard service employees throughout the various railroads in the United States?

A. Yes, generally. I have handled grievances of members of the organization, and of different organizations, throughout the United States and Canada on various railroads of various kinds, under all of the different, or many of the different contracts in existence.

Q. Mr. Nemitz, I will ask you whether or not you made any review of the decisions of the United States Railroad Administration, decisions of the Railway Board of Adjustment No. 1, during the period of July, August and September of 1919 with respect to whether or not there were any decisions involving yardmasters?

A. I have, yes, sir. I believe that I have read over every decision ever rendered by that Board.

245 Mr. Shuttleworth: It might save considerable time—I wanted to refer to certain decisions here, decision

595 and 596, and we might do as we did on some of these other matters for you and save considerable time.

Mr. Smith: The defendants won't raise any question about the authenticity of any of these decisions that you want to refer to that are taken from the official reports of the United States Railroad Administration, Director General of Railroads.

You have just handed me a book, Decision of Railroad Board of Adjustment No. 1, dated July, August and September, 1919.

We raise no question as to the authenticity or the propriety of the court taking judicial notice of any of the decisions in that publication, reserving the right to raise any question as to the relevance, and weight of the material, of course.

Mr. Hassenauer: Is that satisfactory to you, Mr. Raymond?

Mr. Raymond: That is entirely satisfactory.

Mr. Shuttleworth: For the record, might we then have these marked as exhibits; case No. 595 as Plaintiffs Exhibit 1, or would you prefer to have these lettered?

246 The Court: You might offer those in evidence and, I suppose, copies may be substituted rather than leave them?

Mr. Shuttleworth: Yes.

Mr. Smith: So they will be physically in the record.

The Court: And they will be admitted.

Mr. Shuttleworth: 595 and 596.

Mr. Smith: Have you stated exactly what it is you are offering? What are these numbers, are they cases?

Mr. Shuttleworth: We are offering Case 595 on Chicago, Burlington & Quincy Railroad; Case No. 596 on the Chicago, Burlington & Quincy Railroad, being the decisions of the Railway Board of Adjustment No. 1, under the United States Railroad Administration, Director General of Railroads, during July, August and September, 1919.

Mr. Smith: Those cases in their entirety are embraced on Pages 15 and 16 of that publication?

Mr. Shuttleworth: Yes.

The Court: Has that publication been sufficiently described for the record?

Mr. Shuttleworth: It is published by the Washington Government Printing Office. It appears on the frontis-

piece, United States Railroad Administration, Director
247 General of Railroads, Decisions, Railway Board of Adjustment No. 1, July, August and September, 1919, Washington Government Printing Office, 1919.

The Court: That sufficiently identifies it.

Mr. Shuttleworth: Would it be agreeable to substitute photostatic copies of this?

The Court: Yes.

Mr. Smith: You don't need to make them photostat copies.

The Court: They will be received.

(Said documents so offered and received in evidence were marked as Plaintiffs' Exhibits A and B, and are in words and figures as follows, to-wit:)

248 Mr. Shuttleworth: I should also like to offer in evidence a decision of the United States Railway Labor Board under the Transportation Act of 1920, which I had with me, I thought, when I left Cedar Rapids, and I don't find it. It is Decision No. 3350. I wonder if you might have that marked as Exhibit C and arrange to submit it to Counsel, to satisfy them as to its authenticity?

Mr. Smith: I don't think we would have any objection to that, if it is sufficiently identified so there will be no doubt about it.

The Court: All right.

Mr. Smith: If it is a short decision of the sort you have just referred to—it is a decision, I think you said?

Mr. Shuttleworth: That is correct; Decision 3350 of the United States Railway Labor Board under the Transportation Act of 1920.

Mr. Smith: I don't think I want to raise any question about it.

The Court: It will be admitted as Plaintiffs' Exhibit C, and each party may retain its own exhibits.

Mr. Smith: Thank you.

249 (Said document so offered and received in evidence was marked as Plaintiffs' Exhibit C, and is in words and figures as follows, to-wit:)

250 Mr. Shuttleworth: Mark this Exhibit D.

Mr. Smith: We just have one reporter, and I take it the reporter can put his initials on the various exhibits, to make up a record.

The Court: Yes.

Mr. Shuttleworth: I now offer in evidence Plaintiffs' Exhibit D, being a decision of the Southeastern Train Service Board of Adjustment, Docket No. 235.

Mr. Smith: What is this? Is this one that comes under our stipulation?

Mr. Shuttleworth: That is under the Railway Labor Act of 1926, prior to the 1934 amendments.

Mr. Smith: You will let us have a copy of that, too?

Mr. Shuttleworth: Yes.

Mr. Smith: That has already been identified?

Mr. Shuttleworth: That is correct.

The Court: It may be received.

(Said document so offered and received in evidence was marked as Plaintiffs' Exhibit D, and is in words and figures as follows, to-wit:)

251 Mr. Shuttleworth: Plaintiffs also offer in evidence Plaintiffs' Exhibit G and F, being, respectively, Docket 993 and Docket 260, and being decisions of the Eastern Train Service Board of Adjustment; also being a board set up under the Railway Labor Act of 1926 and prior to the 1934 amendments.

Mr. Raymond: That is F and G?

Mr. Shuttleworth: Yes.

Mr. Raymond: What is E, please?

Mr. Smith: These are decisions that were made before this act was passed.

I have not had an opportunity, and I won't take the time of the court to read them now, but we make no objection to authenticity with reference to any of these matters.

I think I probably should object to them on the ground of relevance and materiality, in order to preserve a proper record.

The Court: They will be admitted subject to your objection.

(Said documents so offered and received in evidence were marked as Plaintiffs' Exhibits F and G, and are in words and figures as follows, to-wit:)

252 Mr. Shuttleworth: Plaintiffs also offer in evidence Plaintiffs' Exhibits H and I, being, respectively, Decision No. 669 in Case 928 and Decision No. 363 in Case 525 of the Southwestern Regional Train Service Board of Adjustment.

Mr. Smith: Our position on that is the same, and I take it the same ruling?

The Court: The same ruling.

(Said documents so offered and received in evidence were marked as Plaintiffs' Exhibits H and I, and are in words and figures as follows, to-wit:)

253 The Court: By the way, are you through with the witness?

Mr. Shuttleworth: I have one or two questions, your Honor.

Mr. Raymond: I take it it is not necessary for me to repeat any objections?

The Court: The objections go for both.

Mr. Shuttleworth: Mark these as Plaintiffs group Exhibit J.

Mr. Smith: Are those published anywhere where we can get them?

Mr. Shuttleworth: They are a little difficult to find. That is the reason I suggested we make copies.

Mr. Smith: That will be fine.

Mr. Shuttleworth: The plaintiffs offer in evidence as Plaintiffs' group Exhibit J, a group of decisions of the Train Service Board of Adjustment for the Western Region, being Decisions Nos. 6, 20, 28, 29, 84, 117, 419, 571, 597, 692, 846, 879, 1109, 1170, 1347, 1542, 1702; 1703 to 1708, both inclusive; 1786, 1808, 1809, 1959, 2179, 2311, 2371; 2501 to 2503, both inclusive; 2542, 2759, 2819, 2948, 3118, 3449, 3613, 3622, 3673, 3768, 3911, 3920 and 4098.

Mr. Smith: I won't take time to examine them. I
254 wonder if counsel could just tell us in a word, in a general way, what they are designed to show, and what in his opinion they do show.

Mr. Shuttleworth: They are designed to show that this Board considered and passed upon the yardmasters' cases, and it is the same Board that handled the train, engine and yard service employees.

Mr. Smith: That is the same board that passed on the disputes of both of these groups?

Mr. Shuttleworth: That is right.

Mr. Smith: That was this Southeastern Division?

Mr. Shuttleworth: This group is the Western Region Train Service Board of Adjustment for the Western Region under the Railway Labor Act of 1926 and prior to the amendments of 1934.

Mr. Smith: Yes; thank you.

The Court: They will be admitted subject to your objections as materiality and relevancy.

(Said documents so offered and received were thereupon received in evidence as Plaintiffs' Group Exhibit J, and are in words and figures as follows, to-wit:)

255 Mr. Shuttleworth: On Plaintiffs' Group Exhibit K, which also consists of a group of decisions of the National Railway Adjustment Board, First Division, would you be good enough to initial them, Mr. Reporter?

Mr. Smith: May I ask whether the purpose is the same to show the first division has taken jurisdiction of certain matters?

Mr. Shuttleworth: That is one of the purposes.

We offer this exhibit, Plaintiffs' Exhibit K, consisting of these awards and dockets of the National Railway Adjustment Board; First Division, under paragraph 2 of the stipulation, being awards numbered as follows: 1274, 1603, 1648, 1649, 1896, 1897, 2364, 2490, 2491, 2713, 2970, 3609, 3610, 4117, 4548 and 4584, all of which have been initialed by the court reporter as part of Plaintiffs' Group Exhibit K.

The Court: They will be admitted subject to your objection.

(Said documents so offered and received in evidence were marked in evidence as Plaintiffs' Group Exhibit K, and are in words and figures as follows, to-wit:)

256 Mr. Shuttleworth: Now, I believe that Decision 3350 was to be marked as Exhibit C.

(Document so marked.)

Exhibit C, previously referred to, is now offered in evidence, the same appearing as Decision No. 3350, Docket No. 3403, and appearing at Page 735 of Vol. 6, entitled: "Decisions of the United States Railway Board, with addenda and interpretations," and so forth.

Mr. Smith: The same objection.

The Court: It will be admitted with the same reservations as to objections.

(Said document so offered and received in evidence was marked as Plaintiffs' Exhibit C and is in words and figures as follows, to wit:)

257 Mr. Shuttleworth: Q. Mr. Nemitz, if I understood your preliminary statement correctly, you have worked in yard service?

A. Yes, sir.

Q. Did you work as a yard conductor in the yard?

A. Yes, sir.

Q. You also worked as a road conductor, did you?

A. Yes, sir.

Q. And as a road brakeman?

A. Yes, sir.

Q. How long has it been since you actually worked as a road conductor?

A. Oh, that has been twenty-five or twenty-six years.

Q. During the last twenty-five or twenty-six years, if I understood you correctly, your time has been devoted to serving on various boards and progressing, handling grievances with reference to both conductors and yard service employees, is that true or not?

A. It is true; also brakeman, and occasionally enginemen's complaints.

Q. That has had to do with the various railroads throughout the United States and Canada?

A. That is correct.

258 Q. Mr. Nemitz, I will ask you whether or not as a result of your experience, both as an active worker for railroads, and as a result of our experience in the last twenty-five years in the various capacities which you have described, whether or not the yard service employees among railroad men has any particular or well defined meaning or understanding?

A. They have, yes. Usually they are considered men who work within the switching limits, or certain defined limits, generally referred to as switchmen, or yard limits. They perform a service such as placing cars at different industries, supplying cars of different kinds at different places within those switching or yard limits, and making up and breaking up trains, that is, they break up the incoming trains and they make up the outgoing trains, fixing them in their regular order for the handling by road crews, who will take them from one terminal to some other terminal, or some other point outside of the yard limits or switching limits.

Q. What would you say as to whether or not the class or craft of yardmasters is generally understood to be included within the term or expression of "yard service employees"?

258½ A. I would say that they fit more nearly in with the yard service employees than with any other class. They don't belong in the road service. They have no rights there. They don't belong in the clerical department. They have no rights there. Usually the yardmasters hold rights as yard foremen, or as yard helpers in some yard on the rail-

road, where they hold rights as yardmaster, and where they perform services as yardmasters.

Q. Do I understand you to mean by that, Mr. Nemitz, that yardmasters are usually promoted from yard employees?

A. Quite generally, yes, sir.

Q. And in the order of demotion in the event of lack of business, do these men who are promoted to yardmasters usually retain their seniority as a yard conductor, or yard foreman, or switch tender, or whatever craft it was they held seniority in?

Mr. Smith: I would like the record to show we object to that as immaterial.

The Court: Yes. It will be admitted subject to objection.

A. Yes.

Mr. Shuttleworth: Cross-examine.

259 *Cross-Examination by Mr. Smith.*

Q. Mr. Nemitz, you have been on various boards of one kind and another for some twenty-five or twenty-six years, I think you said?

A. Well—

Q. (continuing) As a representative of the men?

A. Twenty-five or twenty-six years, but I have served in vairous capacities on boards at different intervals for a period of twenty-five or twenty-six years, or twenty-three years. I think the first one was established in 1918. I didn't serve on that board, but I presented cases to that board for decision by it.

Q. While you were on those boards, or tribunals, I take it that the awards or decisions that you participated in would be the best evidence of what you believed at that time?

A. I think so.

Q. You concede that. Let me ask you this, first: Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance "yard service employees" and "yardmen" and "yard crews" generally speaking mean the same thing?

A. Yes, sir.

260 Q. Now, you said you thought of yardmen, and that you understood the term to cover the people that worked within the yard, or within the switching limits, as I understood your statement?

A. That is right, such as making up and breaking up of trains, switching, and so on.

Q. In other words, I think you somewhat qualified that, didn't you? In other words, you are not telling the court that you think, for example, that these clerical people that work in the yards, or car checkers, the weighmasters, or clerks, you don't think of those as yardmen, do you?

A. No, sir.

Q. So that the terms "yard service employees," and the equivalent terms, "yardmen" and yard crews," they don't include all of the men that work within the yard, or within the switching limits, do they?

A. They would not include such as the storekeepers, or the section men, or perhaps other brakemen, or clerks, and so on. Yardmen are usually men who have to do with the making up and breaking up of trains, switching in the yard, and supervising the work of the yardmen, which would include, in my opinion, yardmasters and assistant yardmasters.

261 Q. Where you differ from the witnesses who testified this morning, I take it, is right at this point, that they say that the men who supervise that work that you have just referred to are not within the meaning of the terms, whereas, you include the men who do the work, and also the men who supervise it; that is the difference between—

A. I do. I might say, for this reason: I base it upon these facts, that every tribunal that has decided a dispute for men engaged in yard service, such as yard engineers, firemen, hostlers, hostler helpers, road conductors, trainmen and yardmen, have also decided cases for yardmasters and assistant yardmasters. Division 1, set up under, by agreement, in 1918, the very first board in existence did that. The Western Train Service Board, upon which I served did that, as evidenced by Board decisions submitted here as an exhibit. The Southwestern Train Service Board, where I served, also did so. The Eastern, the Southeastern Board did likewise, and the present Board did likewise, as evidenced by these exhibits, and in addition to that, they make this statement, that this Board, the first division, National Railroad Adjustment Board, has jurisdiction

262 in the dispute, in the dispute of those cases of yardmasters, and decided that there was no question about it, as I understand it, until approximately 1938, when, I believe, Judge Holly handled some sort of case.

Q. Now, you have stated the reasons for your view as to what these terms mean, as I understand it?

A. Yes, sir.

Mr. Smith: Now, your Honor, I move to strike that entire answer as not responsive and as not being the best evidence, and as attempting to characterize and discuss and refer to decisions which counsel on both sides have already brought to the attention of the court. Those decisions are the best evidence of what they contain, and I think the witness' reference to them ought to be stricken.

The Court: He testified, in the first place, as to his understanding of the meaning of the term, and then he gave his reasons for it. I thought perhaps both sides would want the reasons in as showing how he came to that conclusion.

Mr. Smith: I am not at all sorry to have the reason in, your Honor, but I do think—

The Court: I will let it stand subject to your objection.

263 Mr. Smith: All right, sir.

Q. The men that handle trains on the road are called the engineer, fireman, conductor and brakeman, usually, aren't they?

A. Yes, and in addition to that, they are called "road men."

Q. Yes. Now, the men that do somewhat similar work in the yard in place of the engineer out on the line, you still call the engineer in the yard, don't you?

A. Oh, yes.

Q. And the man that does the work that somewhat resembles the conductor's work out on the line is often referred to as the "engine foreman" in the yard, is he?

A. Yes; in some places. Generally, in the Western territory, he is referred to as the "engine foreman." In the Eastern territory he is referred to as a yard conductor.

Q. Now, the fireman is a fireman wherever he is, isn't he?

A. Yes; only they refer to him as a yard fireman to differentiate between a road and a yard employee.

Q. The man that does the work of a brakeman out on the line is referred to, when he does somewhat similar

264 work in the yard, as a switchman, isn't he?

A. Generally as a helper.

Q. As a helper?

A. That is, in the Western territory. Again, in the East, he is referred to as a yard brakeman.

Q. Generally speaking, it is true, as Mr. Green said this morning, is it not, that those men who work in the yard that you have referred to, the engineer and the engine foreman, and the switchman and the fireman, for many years they have had a different basis of pay from the road men, haven't they?

A. Yes; they work by the day, while the men on the road generally work by either the day or by the month.

I might say, also, that their rates differ, engineers' rates differ from the firemen; yard foremen rates differ from engineers and firemen, and differ from the helpers.

Q. They differ among themselves?

A. Differ among themselves.

Q. Because of that difference, you have thought of them for years, haven't you, as yardmen and road men, or men out on the line?

A. Well, yardmen are men that work within the defined switching limits, or yard limits.

265 Q. And they have those different rates of pay?

A. They have different rates between themselves, and different rates and different methods of compensation than they have on the road, and have different rates than the yardmaster or assistant yardmaster, also?

Mr. Smith: That is all.

The Court: Any redirect examination? Mr. Raymond?

Cross-Examination by Mr. Hassenauer.

Q. Have you ever been appointed to sit as a member of the First Division of the National Railroad Adjustment Board?

A. Not appointed; I acted as a substitute on that board in the absence of our member serving regularly on that board.

Q. You sat on that board and entered into discussions and decisions of cases brought before you as a substitute member, did you not?

A. I did.

Q. You testified that you were a member of some of these other adjustment boards which were established prior

266 to the Act of 1926 and subsequent to the enactment of that act by Congress. As I understand your testimony disputes between carriers and train and yard service employees, including those of yardmasters, were heard by

one particular board to the exclusion of disputes between carriers and other crafts and classes of employees such as clerks, telegraphers, and what we generally know as the shop crafts, is that correct?

Mr. Smith: Just a minute. In the first place, I think the witness ought not to be permitted to testify. This is not cross-examination.

The Court: That is quite a big question.

Mr. Smith: Besides I object to it on the ground it is wholly immaterial.

I would like to say a word about that. We are here because Division 1 and Division 4 have had different views as to who ought to have jurisdiction of yardmasters. That is the reason we are here, and that is the only reason we are here.

Now, Division 4 has decided some of these cases, Division 1 has decided some, and apparently each thought they ought to decide them all. That has given rise to the controversy which brings us here.

267 Now, I think we are lifting ourselves by our bootstraps if we try to show to this court what these words mean that are in the statute by emphasizing through this witness, or otherwise, the different views that these divisions have taken, which caused us to come here.

Over and above all that, both counsel have had great liberty in referring to any decisions that they wanted to refer to. That is the best evidence of what these boards have done. We have put in many for quite different purposes, and my friends on the other side have put in many.

Why try to get the witness to testify to what the boards have done when the only thing, officially, they have done is speak through their decisions? Like your Honor, they don't talk casually on the stretch; they speak through their decisions.

The Court: With the decisions in, is it necessary to have the witness testify on that subject?

Mr. Hassenauer: I will ask this question:

Q. As a member of these Federal Adjustment Boards, other than the National Railroad Adjustment Board, did you, as a board, decide any disputes involving disputes by the clerks organization?

A. No.

268 Mr. Smith: I object to that. They can bring in any decision they want.

The Court: He said no. I will let it stand.

Cross-Examination by Mr. Raymond.

Q. You don't mean to leave the impression the yardmasters are drawn from the ranks of the people you referred to as yard men?

A. There are some exceptions [illegible] generally speaking, I think they are promoted from that class.

Q. That varies a great deal in various sections of the country, doesn't it?

A. My general experience is they are promoted from the yard men.

Q. There are osme sections where a great many come from the ranks of clerks and inspectors, and so forth?

A. Only a few, to my knowledge.

Mr. Raymond: That is all.

269 *Redirect Examination by Mr. Shuttleworth.*

Q. I would like to ask one question to make clear: When we speak about road men and yard men, when a road man, or a crew, operating a train, for example, that starts off, perhaps, from Cedar Rapids and comes into the yard at Chicago, can you explain to the court whether or not, at what point that road crew comes under the jurisdiction of the yardmaster?

A. When it comes within side of the switching limits, or the yard limits.

Mr. Shuttleworth: I believe that is all.

Mr. Smith: No further questions.

Mr. Shuttleworth: That is all.

(Witness excused.)

Mr. Shuttleworth: The plaintiff rests, your Honor.

270 The Court: Rebuttal?

WILLIAM H. BARBOUR, called as a witness herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hassenauer.

Q. What is your name, please?

A. William H. Barbour.

Q. And where do you live?

A. 7351 North Damen Avenue, Chicago.

Q. By whom are you employed?

A. Chicago, Milwaukee & St. Paul Railroad.
Q. In what capacity?
A. Yardmaster.
Q. How long have you been in that position?
A. About three years.
Q. Prior to that time, were you engaged by that railroad in the yards as a yard service employee?
A. Yes, sir.
Q. Then subsequently you were promoted to the position of yardmaster, which you now occupy?
A. Yes, sir.
Q. I will ask you whether or not the promotion from
271 yard service employee to yardmaster is in accordance with the scheduled agreement in effect on the property of that carrier?
A. Yes, sir.
Q. Also whether or not when a yardmaster is promoted from one class or craft, does he retain his seniority in that craft or class from which he has received his promotion?
A. Yes, sir.
Mr. Smith: Just a moment. I object to that as not the best evidence. If Mr. Hassenauer wants to offer this agreement that this gentleman is undertaking to testify about, I won't make any objection to it; but, I do think we ought to have the agreement rather than the comments of the witness on the agreement.
The Court: I am wondering; is the agreement acceptable?
Mr. Smith: Oh, yes.
The Court: If the agreement is here, it is all right. It is not always necessary to put the original document in evidence. Sometimes secondary evidence can be offered. If the agreement is here, I think it might be put in evidence.
Mr. Hassenauer: I don't have the Milwaukee agreement.
272 Mr. Smith: It is perfectly easy to get it.
The Court: If it can be obtained, let the agreement be put in evidence, by agreement of the parties.
Mr. Hassenauer: All right. That is all.
Mr. Smith: I want that agreement pretty carefully identified. We might ask this witness to identify the exhibit for us.

Cross-Examination by Mr. Smith.

Q. Mr. Barbour, what is this agreement you have been referring to? Will you identify it so there will be no mistake on the record as to what the agreement is, as to what agreement is referred to?

A. It is an agreement you will be promoted from the ranks of the seniority list to yardmaster.

Q. What section of the agreement is that?

A. I couldn't tell you what section it is.

Mr. Raymond: What agreement is it?

The Court: What is the date of the agreement?

Mr. Raymond: Who are the parties to it?

The Court: The agreement should be identified some way.

Mr. Smith: Can we do this, your Honor? Can we
273 have an understanding with Mr. Hassenauer that within three days he will submit to the reporter and submit to us these seniority excerpts from this particular existing agreement that he has asked the witness to testify about?

The Court: How about that Mr. Hassenauer?

Mr. Smith: How many of those provisions are there in there that relate to this matter of promoting people from yard men to yardmasters? Is there just one provision in this agreement?

Mr. Hassenauer: Just one short paragraph.

Mr. Smith: That will be the paragraph you will put in, isn't it?

Mr. Hassenauer: Yes.

Mr. Smith: We object on the ground it is immaterial, not otherwise.

Mr. Raymond: Those excerpts will show who made the agreement and when?

Mr. Hassenauer: Yes. It will be marked Labor Member's Exhibit A.

The Court: And received in evidence.

(The said documents so offered and received in evidence were marked Labor Member's Exhibit A, and are in words and figures as follows, to-wit:)

274 EDWARD T. JORDAN, called as a witness herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hassenauer.

Q. State your name.
A. Edward T. Jordan.
Q. Where do you reside?
A. 804 North Oak Park Avenue, Oak Park, Illinois.
Q. By whom are you employed?
A. Order of Railway Conductors.
Q. In what capacity?
A. General Chairman of the Grievance Committee, Chicago & North Western Railway.
Q. You have heard the testimony of Mr. Barbour with reference to the promotion of yardmasters from yard men: Does that rule obtain on the lines of the Chicago & North Western Railway?
Mr. Smith: The same objection, your Honor.
The Witness: It does.
Mr. Hassenauer: Q. I now hand you—
Mr. Smith: Just a minute, please.
The Court: He is talking now about a general custom. I suppose that is admissible.
275 Mr. Smith: He asked whether it obtained on the North-Western Railway.
The Court: What is the objection?
Mr. Smith: The objection is that it is not the best evidence. I am perfectly willing to have the seniority rule in here.
The Court: He asked the general custom. If there is a general custom and no agreement the custom would be admissible.
Mr. Smith: I think so.
The Court: If there is an agreement, the agreement should be put in evidence.
Mr. Hassenauer: This will be introduced on behalf of the Labor Members. I don't know what exhibit number to give this.
The Court: Let it be Labor Members' Exhibit B.
Mr. Hassenauer: This is an excerpt from an agreement between the Chicago & North Western Railway Company and Brotherhood of Railroad Trainmen, effective August

21, 1935. I am reading from Rule 12 entitled "Seniority Rights," Subdivision B, appearing on Page 82 of that agreement:

"The right to preference of work and promotion will
276 be governed by seniority in service. The yard man oldest in service will be given the preference, if competent. In the appointment of yardmasters and assistant yardmasters the senior yard men will, in all cases, be given full and unprejudiced consideration. Yard men appointed to position of yardmaster or assistant yardmaster in their seniority district will not forfeit seniority as yard men while so assigned."

Mr. Smith: No objection to that except on the ground of relevancy.

The Court: All right.

Mr. Raymond: I want to cross-examine a little bit about it, or ask some question or two about it. I don't know whether I will depend on this witness or Mr. Hassenauer.

The Court: Ask Mr. Hassenauer; maybe you can agree.

Mr. Raymond: Do you know whether this agreement—how was it identified, Labor Members' Exhibit B? Do you know whether it is in effect now or not?

Mr. Hassenauer: It is.

Mr. Raymond: It is not, so far as yardmasters are concerned?

Mr. Hassenauer: You are asking the question and I
277 am telling you it is in effect so far as railroad trainmen are concerned.

Mr. Raymond: You are not suggesting the Brotherhood of Railroad Trainmen represent yardmasters on the North Western at this time?

Mr. Hassenauer: We have an agreement which protects yardmasters in regard to their promotion.

Mr. Raymond: That is nice of you, but you are not contending the Brotherhood of Railroad Trainmen is the bargaining agency for the yardmasters on the North Western line?

Mr. Hassenauer: No.

Mr. Raymond: It can be agreed the American Supervisory Association does represent the yardmasters on the North Western line?

Mr. Hassenauer: That is right.

Mr. Raymond: All right.

Mr. Hassenauer: That is all.

Mr. Smith: We have nothing further.

288 And afterwards on, to wit, the 9th day of June, 1944, there was filed in the Clerk's office of said Court a certain Memorandum of the Honorable William H. Holly, District Judge, in words and figures following, to wit:

289 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—3788) * * *

MEMORANDUM.

This is an action for a declaratory judgment in which all the parties are asking the court to determine whether under the terms of the Railway Labor Act, 45 U.S.C. Ch. 8, disputes between Railroad yardmasters and the employing railroad go to the first or fourth division of the Adjustment Board created by that Act.

The Adjustment Board is composed of representatives of railroads and of the national organizations of railroad employees and the Act, Sec. 153, First, requires the parties in cases of dispute that cannot be settled in the usual way by negotiation to submit such disputes to the Adjustment Board. By subdivision (h) of that section it is provided that the board shall be composed of four divisions, the first division to have jurisdiction over "disputes involving train- and-yard-service employees of carriers; that is, engineers, firemen, hostlers and outside hostler's helpers, conductors, train men, and yard service employees." The fourth division is given jurisdiction "over disputes involving employees of carriers directly or indirectly engaged in the carriage of passengers or property by water and all other employees of carriers over which jurisdiction is not given to the
290 first, second or third divisions. We are not concerned here with the jurisdiction of the second or third divisions as it is agreed by all the parties to the case that either the first or fourth division has jurisdiction of disputes involving yardmasters.

The plaintiffs are certain national railway labor unions and their officers. Ten of the defendants are the members of the first division of the Adjustment Board, five representing carriers and five representing national railway labor organizations. The remaining six are members of the fourth division of the board, three representing carriers and three representatives of Maritime Unions.

Plaintiffs contend that the first division has jurisdiction of yardmasters disputes. The defendant carrier members of the first and fourth division take the position that jurisdiction is vested in the fourth division. The Great Northern Railway Company, the Southern Pacific Company and the Railroad Yardmasters of America (a labor organization of railroad yardmasters), intervening defendants, also argue that the fourth division has jurisdiction of such disputes.

First—it is contended by the Railroad Yardmasters of America that the question has been settled by a decree of this court entered in chancery proceeding No. 16031 on July 11, 1938, and that such decree "was and is an adjudication in rem binding on plaintiffs and all other parties interested and finally settling and adjudicating the issues raised and the rights sought to be declared by the petition for declaratory judgment herein."

It is true that the writer of this memorandum did enter a decree in said chancery proceeding in which it was held that yardmasters were not included in any of the classes of employees of whose disputes jurisdiction is given by the Act in question to the first, second or third divisions and that the fourth division had jurisdiction to hear and
291 adjudicate disputes involving yardmasters. The decree enjoined and commanded the fourth division to docket, hear, determine and enter awards on three ex parte submissions involving yardmasters theretofore filed with said fourth division, but I am of the opinion that the judgment entered in that case does not bind the court or the parties in this or in any other proceeding than the one in which the decree was entered.

In that case the petition for mandamus was filed by the Railroad Yardmasters of America against the members of the fourth division of the National Railroad Adjustment Board, praying that an order be entered commanding them to hear and determine certain disputes mentioned in the petition. Summons was issued, the defendants appeared and filed an answer admitting that they were members of said fourth division and that they were of the opinion that said division had jurisdiction of said disputes. Thereupon the decree above mentioned was entered *by consent of the parties.*

The writer does not have any recollection of the case but is certain that there was no hearing and that the decree

was entered without any examination of the law or the facts but as a matter of course as in any other case where the parties had agreed and consented to the entry of a particular decree. The court was not advised that there was a public question involved or that anyone aside from the parties had any interest in the question presented. It is a little difficult to understand why the suit was instituted or why the parties asked the court to enter a decree if they were agreed as to the law and facts. There was no reason for the submission of the case to the court. If it was intended to get a decree which should be determinative of the issues as to all the world, counsel owed the duty to the court of so informing it. In my opinion I am not bound by that decree in this or any other case where there is a real contest, a decree which it appears I was induced to enter by collusion of the parties and without any con-
292 sideration of the issues involved.

Further, that case was not an action in rem. It had none of the characteristics of such an action. An action in rem is a proceeding against a thing or property and the judgment binds all the world. Would counsel contend that my judgment in that case is binding upon all other tribunals, including the Supreme Court of the United States, which may be called upon to determine whether the first or fourth division have jurisdiction of disputes involving yardmasters?

Second: We come now to the merits of the case. The Act gives the first division jurisdiction of "yard-service employees." If yardmasters are yard service employees the first division has jurisdiction; if not jurisdiction is in the fourth division.

The duties of a yardmaster as stated in the stipulation of the parties are as follows:

"The duties of yardmasters vary at different terminals, because of the nature and quantity of the traffic passing through or assembled, distributed, and interchanged at different terminals. Depending upon the size and nature of the yard, the yardmaster's duties may be performed by him in person or they may be exercised under his supervision by as many as fifty or more subordinate employees. The yardmaster is responsible for all work necessary in the running of the yard, in the sense that he must see that such work is done and is done properly, whether the work is yard service, train and engine service, clerical service,

communication service, maintenance service, repair service, or, in some cases, dealing with patrons in the matter of shipments arriving at, passing through or departing from the yard. A yardmaster, however, is not permitted actually to perform the work of certain classes of employees under his supervision, such as passing signals, riding cars to a stop, and throwing switches. His duties with respect to the physical movement of trains and engines, maintenance, and repair are purely supervisory."

293 The yard is a system of railroad tracks within defined limits over which movements of engines and cars not authorized by time table or train order may be made. The work performed in a yard includes switching, making and breaking up of trains, storing cars, moving trains into, out of and through the yard, inspecting cars and freight, repairing cars, maintaining track and other fixed equipment, sending and receiving messages by telephone and telegraph, keeping records and making reports. The employees who perform such work "include those known as yard men, that is, switch or yard foremen, yard helpers, and switch tenders, and employees in train and engine service, such as engineers, firemen, hostlers, conductors, brakemen, flagmen, and baggagemen; they also include clerks, telephone and telegraph operators in the yard offices, tower men operating interlocking switches, maintenance-of-way foremen and laborers, signal department forces engaged in the maintenance of yard signal plants and car inspectors and repairers."

It is also stipulated that all such yard men and other employees performing work in a yard are directed and supervised in their work by a yardmaster, with the aid, if necessary, of one or more yardmasters. Practically, it seems, the yardmaster is superintendent of the yard.

All of the parties seem to agree that the term yard service employee has come to have a well defined meaning among those engaged in railroad operation, but they differ as to the meaning so acquired. Plaintiffs say that it includes yardmasters, while the Railroad Yardmasters of America, and the defendant carrier and carrier's representatives, say that it does not.

The defendants mentioned called as witnesses, Thomas L. Green, the general manager of the Indiana Harbor Belt Railroad, which operates a number of yards and whose work is very largely done in yards, Mr. Edmund G.

294 Kiesele, superintendent of terminals of the Chicago, Milwaukee & St. Paul Railroad, and Morris E. Sommerlott, assistant personnel manager of personnel for the Southern Pacific Company, who testified that the term yard service employees referred to employees who make up and break up trains in the yard, switching cars, placing and pulling of cars at industries within those yards, namely, engineers, firemen, conductors or engine foremen, yard brakemen, switchers of helpers; that the term was equivalent to "yard crew" or "yard men" and that it did not include yardmasters.

For the plaintiff the senior vice president of the Order of Railway Conductors testified that yard men are considered "men who work within the switching limits, or certain defined limits, generally referred to as switchmen, or yard limits. They perform a service such as placing cars at different industries, supplying cars of different kinds at different places within those switching or yard limits, and making up and breaking up trains, that is, they break up the incoming trains and they make up the outgoing trains, fixing them in their regular order for the handling by road crews, who will take them from one terminal to some other terminal, or some other point outside of the yard limits or switching limits."

Asked the direct question whether the class or craft of yardmasters was generally understood to be within the term or expression "yard service employee," he repied, "I would say that they fit more nearly in with the yard service employees than with any other class. They don't belong in the road service. They have no rights there. They don't belong in the clerical department. They have no rights there. Usually yardmasters hold rights as yard foremen, or as yard helpers in some yard on the railroad, where they hold rights as yardmaster, and where they perform services as yardmasters."

295 Three witnesses testified that among railroad operatives the term yard service employee did not include yardmasters. The one witness who testified for plaintiffs did not deny this. All he said was that "they fit more nearly in with the yard service employees than any other class." That certainly is not a statement they are members of that class. It implies that they are not, that they are not in any class mentioned in the statute but are more nearly related to the class of yard service employees than any other class. Clearly as to the direct evidence introduced on this subject the preponderance is against the plaintiffs.

Plaintiffs say, however, that the statute is so clear and unequivocal in its meaning that "there is no ambiguity which would either require or permit extrinsic evidence as to the intent of Congress." But evidence tending to show the meaning of a word or phrase of a statute is not *extrinsic* evidence as to the intent of the legislature. To know the intent of the legislature one must know the meaning to be given to the terms employed. Words of common use are given their ordinarily understood meaning, and technical words are to be taken in the technical sense, that is, the meaning understood by practitioners in the particular field. The direct evidence here is that among those engaged in operating railroads, yard service employee means a person actually engaged in the performance of the operations going on in a railroad yard and does not include yardmasters.

Prior to the passage of the present Railway Labor Act Congress had passed two other acts containing provisions for the creation of Boards of Adjustment for the settling of labor disputes, the Transportation Act of 1920 (Ch. 91, 41, Stat. 469, Title III) and the Transportation Act of 1926 (Ch. 347, 44 Stat. 577, Title III) but in each case the board was created by agreement of the parties and it had such jurisdiction as the parties gave it by the terms of the agreement. I do not think that the fact that by those agree-
296 ments the disputes of both yard men and yardmasters were heard by the same tribunal is helpful in determining the meaning of the term yard service employees in the present statute.

Prior to the decision of this court in Case 16031 several disputes involving yardmasters had been heard and determined by the first division. That fact might be quite persuasive as to the meaning to be given the term yardmasters were it not that the fourth division had also heard and determined certain such cases. Each division seemed to be of the opinion that it had jurisdiction of such disputes. Further, many of the disputes involved primarily the rights of yard men, men who clearly came under the classification of yard service employees.

It is the judgment of the court that the fourth division has jurisdiction of disputes involving yardmasters. The parties may present drafts of furnishing of fact, conclusions of law and judgment order at their convenience.

Holly,
Judge.

296½ And afterwards, to wit, on the 12th day of July, 1944, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before Honorable William H. Holly, District Judge, appears the following entry, to wit:

297 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—3788) * *

ORDER OF SUBSTITUTION.

It has been made to appear to the Court that the following changes have occurred in the membership of the First and Fourth Divisions of the National Railroad Adjustment Board:

1. O. E. Swan has become a carrier member of the First Division, succeeding the defendant, E. W. Fowler, resigned;

2. M. G. Leach has become a labor member of the First Division, succeeding the defendant, R. E. Edrington, resigned;

3. H. J. Reeser has become a carrier member of the Fourth Division, succeeding the defendant, E. J. Hamner, resigned;

4. J. W. Cox has become a carrier member of the Fourth Division, succeeding R. P. Travis, resigned, who had previously succeeded the defendant, F. A. Coile, upon his resignation;

298 5. E. W. Fowler has become a carrier member of the Fourth Division, succeeding the defendant, E. Murrin, deceased; and

6. W. O. Holmes has become a labor member of the Fourth Division, succeeding the defendant, J. H. Blake, resigned.

It Is Therefore Ordered:

The aforesaid O. E. Swan, M. G. Leach, H. J. Reeser, J. W. Cox, E. W. Fowler (as a carrier member of the Fourth Division), and W. O. Holmes are hereby substituted as parties defendant in this action in place of, respectively, the originally named defendants, E. W. Fowler (as a carrier member of the First Division), R. E. Edrington, E. J. Hamner, F. A. Coile, E. Murrin, and J. H. Blake.

Enter:

Holly,

Dated July 12, 1944. *District Judge.*

298 And afterwards, to wit, on the 20th day of July, 1944, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

299 IN THE DISTRICT COURT OF THE UNIRED STATES

* * (Caption—3788) * *

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY JUDGMENT.

The action having been tried by the Court without a jury and the court having heard the witnesses and considered the evidence, oral and documentary, introduced at the trial on behalf of the plaintiffs, the defendants and the intervenors, and having filed its opinion, which is made a part hereof, on June 9, 1944, the Court hereby
300 finds the facts, states its conclusions of law, and enters its declaratory judgment as follows:

Findings of Fast

1. This is an action for a declaratory judgment under Section 274d(1) of the Judicial Code, 28 U.S.C., Sec. 400(1). Plaintiffs are two voluntary, unincorporated associations of railroad employees, national in scope, and certain officers thereof; defendants are the members of the First and Fourth Divisions of the National Railroad Adjustment Board. Intervening defendants are the Great Northern Railway Company and the Southern Pacific Company, rail carriers, and the Railroad Yardmasters of America, a voluntary, unincorporated association of railroad employees, national in scope. Plaintiffs, defendants, and the intervening defendants all pray for a declaratory judgment construing Second 3 First (h) of the Railway Labor Act, 45 U.S.C., Sec. 153 First (h), in so far as it relates to disputes involving railroad yardmasters.

2. Section 3 First (i) of the Railway Labor Act, as amended in 1934, provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules,

or working conditions" shall be handled on the property of the carrier concerned and, if unadjusted, may be referred to "the appropriate division of the Adjustment Board."

Section 3 First (h) of said statute provides as follows:

301 "(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, train-men and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car-men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids, and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

3. Prior to August, 1941, the First Division of the National Railroad Adjustment Board had heard disputes involving yardmasters and had rendered awards in such dis-

putes. Since August, 1941, the five carrier members and the five labor members of the First Division have been deadlocked on the question whether the statutory definition of the jurisdiction of the First Division, as contained in Section 3 First (h) of the Railway Labor Act, includes
302 disputes involving yardmasters. As a result, yardmasters' disputes docketed with the First Division remain unconsidered and unadjusted. On March 21, 1938, the Railroad Yardmasters of America, acting for three of its yardmaster members, filed with the Fourth Division of the National Railroad Adjustment Board an ex parte submission of disputes involving said yardmaster members. A deadlock developed on March 24, 1938, between the carrier members and the labor members of said Fourth Division over the question of the jurisdiction of that division to hear disputes involving yardmasters. Thereafter, on July 11, 1938, this court, in Chancery No. 16031, upon petition of the Railroad Yardmasters of America and the particular yardmasters involved in said disputes, entered a decree ordering the Fourth Division to hear those disputes, and since that time the disputes involving yardmasters belonging to the Railroad Yardmasters of America have been submitted to and adjusted by the Fourth Division. The plaintiff labor organizations have continued to submit to the First Division the disputes of their yardmaster members, although the aforesaid deadlock in the First Division has prevented consideration of such disputes.

4. A yardmaster is a railroad employee who supervises operations in a railroad yard. A railroad yard is a system of tracks within defined limits, over which movements of engines and cars not authorized by timetable or train order may be made, subject to prescribed signals and rules or special instructions.

5. The work performed in a railroad yard includes switching, making and breaking up trains, storing cars, moving trains into, out of, and through the yard, inspecting cars, maintaining track and other fixed equipment, sending and receiving messages by telephone and telegraph, keeping records, and making reports. Over all such work and the employees engaged therein the yardmas-
303 ter has general supervision. Depending upon the size and nature of the yard, the yardmaster's duties may be performed by him alone or with the aid of one or more assistant yardmasters.

6. Yardmasters and assistant yardmasters have direct supervision over the employees, known as yard men or yard-service employees, who are engaged in making up, breaking up, and switching trains within yards and industrial districts assigned thereto. The necessary clerical work involved in the operation of a railroad yard requires the keeping of many records and the making of numerous reports. The employees who perform such clerical work, including office clerks, car checkers, yard checkers and weighmasters, are employed inside the limits of the yard and, like the yard men, are directly under the yardmaster's supervision. Yardmasters and assistant yardmasters do not and may not perform the work of yard men, their duties with respect to switching and making and breaking up trains being purely supervisory; they may perform some clerical work if their entire time is not taken up with the direction and supervision of yard men and other employees working in yards.

7. Yardmasters and assistant yardmasters are not train-service or yard-service employees of rail carriers; that is to say, they are not engineers, firemen, hostlers, outside hostler helpers, conductors, trainmen, or yard-service employees.

8. The terms "yard service" and "yard-service employees" are not terms in general and common usage in the English language.

9. The terms "yard service" and "yard-service employees" are and have been for many years, both prior
304 and subsequent to the amendment of the Railway Labor Act in 1934, technical terms in railroad usage, with definite meanings clearly understood by persons familiar with that usage.

10. The term "yard-service employees," as used in Section 3 First (h) of the Railway Labor Act with reference to the jurisdiction of the First Division of the National Railroad Adjustment Board, was taken by Congress from railroad usage and was introduced into the said statute upon its amendment in 1934 as a railroad term having the meaning customarily assigned to it in railroad parlance.

11. At the time of the amendment to the Railway Labor Act referred to in the preceding paragraph 10, for many years prior thereto, and since that time, the term "yard-service employes" referred, and has referred, solely to railroad employees engaged in making up and breaking up

trains and switching trains and cars within yard limits. Over the same period of time the term "yard service" has denoted the work performed by such employees, who include engineers, firemen, conductors or engine foremen, yard brakemen or switchmen, and switchtenders.

12. During the period of time referred to in the preceding paragraph 11, the terms "yard service" and "yard work" have been synonymous and have been used interchangeably in railroad parlance, and the terms "yard-service employees" and "yard men" have been synonymous and used interchangeably in railroad parlance.

13. Railroad usage, as evidenced by the testimony of experienced railroad officials and representatives of railroad employees, has never included yardmasters and 305 assistant yardmasters within the meaning of the terms "yard-service employees" or "yard men," and yardmasters and assistant yardmasters have never been regarded as yard-service employees or yard men.

Conclusions of Law.

1. This is a case of actual controversy, and the court has jurisdiction of the subject-matter of this action and of the parties hereto.

2. The definitions of the jurisdiction of the First, Second, and Third Divisions of the National Railroad Adjustment Board, as quoted in paragraph 2 of the foregoing findings, do not include disputes involving yardmasters and assistant yardmasters, and such disputes are therefore not subject to the jurisdiction of said First Division or of said Second or Third Division.

3. The decree entered by this court in United States ex rel. Railroad Yardmasters of America, et al., *vs.* National Railroad Adjustment Board, Fourth Division, et al., Chancery No. 16031, is not res adjudicata and does not bind this court or the parties in this or in any other proceeding than the one in which the decree was entered.

4. Disputes involving yardmasters and assistant yardmasters are included in the definition of the jurisdiction of the Fourth Division of the National Railroad Adjustment Board by the following language from Section 3 First (h) of the Railway Labor Act:

"Fourth division: To have jurisdiction over disputes involving • • • all other employees of carriers over

which jurisdiction is not given to the first, second, and third divisions."

Disputes involving yardmasters and assistant yard-
306 masters are therefore subject to the jurisdiction of said Fourth Division.

5. Plaintiffs' petition should be denied, and judgment should be entered for the defendant carrier members of the First and Fourth Divisions of the National Railroad Adjustment Board and the intervening defendants on their counterclaims for a declaratory judgment that disputes involving yardmasters are subject to the exclusive jurisdiction of the Fourth Division of the National Railroad Adjustment Board.

It Is Therefore Ordered, Adjudged, and Decreed:

The rights and other legal relations of the parties are as follows:

The Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction, under the terms of Section 3 First (h) of the Railway Labor Act, as quoted in paragraph 2 of the foregoing findings, to hear disputes involving yardmasters and assistant yardmasters employed by rail carriers and to render awards in such disputes. The First Division of the National Railroad Adjustment Board has no jurisdiction over such disputes and is not entitled to hear and render awards in the same.

Enter: Holly.
District Judge.

Dated July 20, 1944.

307 And on the same day, to wit, the 5th day of September, 1944, came the Plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Notice of Appeal, in words and figures following, to wit:

308 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eatsern Division

The Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President, *Plaintiffs.* *vs.* O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach, Fred Lewis, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes, and J. M. Fox, *Defendants.*	Civil Action No. 3788

NOTICE OF APPEAL.

Notice is hereby given that the Order of Railway Conductors of America and the Brotherhood of Railroad Trainmen, voluntary unincorporated associations, plaintiffs above named, do hereby appeal to the United States Circuit Court of Appeals for the 7th Circuit from the order, judgment and decree of the court entered in this cause on July 20, 1944, that the Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction, under the terms of Section 3, First (h) of the Railway Labor Act, to hear disputes involving yardmasters and assistant yardmasters and to render awards in such dis-

putes and that the First Division of the National Railroad Adjustment Board has no jurisdiction over such disputes and is not entitled to hear and render awards in the same.

V. C. Shuttleworth,
W. A. Endle,
E. L. Gordon,
Attorneys for Plaintiffs.

Chicago, Illinois,
August 31, 1944.

Of Counsel:
E. L. Gordon,
100 West Monroe Street,
Chicago, Illinois.

309 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said court, do hereby certify that on the 7th day of September, 1944, in accordance with Rule 73 (b) of the Rules of Civil Procedure for Distiret Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Messrs: John Knox, 10 S. La Salle Street, Chicago, Ill.
Sidney H. Prince, Jr., 220 S. State Street, Chicago, Ill.
Leo J. Hassenauer, 105 W. Adams Street, Chicago, Ill.
Poppenhusen, Johnston, Thompson & Raymond, 11 S. La Salle Street, Chicago, Ill.
John A. Sheean, 208 S. La Salle Street, Chicago, Ill.
Bryce L. Hamilton, 38 S. Dearborn Street, Chicago, Ill.
Sidley, McPherson, Austin & Burgess, 11 S. La Salle Street, Chicago, Ill.

Roy H. Johnson,
Clerk.

(Seal)

310 And on the same day, to wit, the 5th day of September, 1944, came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Bond on Appeal, in words and figures following, to wit:

311 Bond No. 4743113.

Know All Men by These Presents:

That we, the Order of Railway Conductors of America, a voluntary unincorporated association, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President, and Brotherhood of Railroad Trainmen, a voluntary unincorporated association, A. F. Whitney, President, and S. R. Harvey, Assistant President, as Principals, and Fidelity & Deposit Company of Maryland, a corporation licensed to do business in the State of Illinois, as surety, are held firmly bound unto O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holves and J. M. Cox, in the penal sum of Two Hundred Fifty Dollars ($250.00), for the payment of which well and truly to be made we bind ourselves and our successors, jointly and severally, by these presents.

Witness our hands this 29th day of August, A. D. 1944.

The Condition of the Above Obligation Is Such that, Whereas the said O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox, individually, and as members of the National Railroad Adjustment Board, did, on July 20, 1944, have entered in their favor a certain final order, judgment and decree in an action in the District Court of the United States, for the Northern District of Illinois, Eastern Division, No. 3788, entitled "The Order of Railway Conductors of America, et al, plaintiffs, *vs.* O. E. Swan, et al, defendants" in and by the terms of which a declaratory judgment was entered providing that the Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction, under the terms of Section 3, First (h) of the Railway Labor Act, to hear disputes involving yardmasters and assistant yardmasters and to render awards in such disputes and that the First Division of the National Railroad Adjustment Board

has no jurisdiction over such disputes and is not entitled to hear and render awards in the same; and, Whereas the said plaintiffs have perfected an appeal to the Circuit Court of Appeals for the 7th Circuit by filing in the District Court on this date a Notice of Appeal;

Now, therefore, if the said Principals, plaintiffs in said cause, shall duly prosecute said appeal with effect, and moreover pay the amount of costs if the appeal is dismissed or the said judgment affirmed for any costs as may be awarded by said Circuit Court of Appeals if the judgment be modified, and to pay all costs on appeal as may be entered against said appellants; then the above obligation is said to be void, otherwise to remain in full force and effect.

The Order of Railway Conductors of America, a voluntary unincorporated association, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President, snd

Brotherhood of Railroad Trainmen, a voluntary unincorporated association, A. F. Whitney President, and S. R. Harvey, Assistant President, as Principals,

By F. H. Nemitz,
Attorney-in-Fact.

Fidelity & Deposit Company of Maryland,

By Julian S. Neal,
Agent and Attorney-in-Fact.

(Seal)

Signed and delivered
In presence of:
Leo J. Hassenauer,
E. C. Klopf.

311½ State of Illinois, } ss.
County of Cook. }

I, Ronald W. Fuermann, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Julian S. Neal, Agent and Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, who is personally known to me, appeared before me this day and acknowledged that he signed, sealed and delivered the foregoing instrument as his free and voluntary act as Agent and Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, and as the free and voluntary act of the Fidelity and Deposit Company of Maryland, for the uses adn purposes therein set forth.

Given under my hand and Notarial Seal this 29th day of August, A. D. 1944.

Ronald W. Fuermann,
(Seal) *Notary Public.*

My commission expires February 16th, 1948.

312 And afterwards on, to wit, the 5th day of September, 1944, came the defendants, F. J. Williams, et al, by their attorneys and filed in the Clerk's office of said Court their certain Notice of Appeal, in words and figures following, to wit:

313 IN THE DISTRICT COURT OF THE UNITED STATES

for the Northern District of Illinois

Eastern Division

The Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President,

Plaintiffs.

vs.

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach, Fred Lewis, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes, and J. M. Fox,

Defendants.

Civil Action No. 3788

NOTICE OF APPEAL.

Notice Is Hereby Given That F. J. Williams, William Bishop, Paul M. Carter, Fred Lewis and M. J. Leach, individually, and as members of the National Railroad Adjustment Board, designated as defendants above, jointly and severally with The Order of Railway Conductors of America and the Brotherhood of Railroad Trainmen, pursuant to Rule 74 of the Rules of Civil Procedure, do hereby appeal to the Circuit Court of Appeals for the 7th Circuit from the order, judgment and decree of the court entered in this cause on July 20, 1944, that the Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction, under the terms of Section 3, First (h) of the Railway Labor Act, to hear disputes involving yardmasters and assistant yardmasters and to render awards in such disputes and that the First Division of the National Railroad Adjustment Board has no jurisdiction over such dis-

putes and is not entitled to hear and render awards in the same.

Leo J. Hassenauer,
Attorney for F. J. Williams, William Bishop, Paul M. Carter, Fred Lewis and M. J. Leach.

Chicago, Illinois,
August 31, 1944.

Leo J. Hassenauer,
38th Floor, 105 W. Adams
Street, Chicago 3, Illinois.

314 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 7th day of September, 1944, in accordance with Rule 73 (b) of the Rules of Civil Porcedure for District Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Messrs.: V. Craven Shuttleworth, W. H. Endle, Everett L. Gordon, 100 West Monroe Street, Chicago, Ill.
John Knox, 10 So. La Salle Street, Chicago, Ill.
Sidney H. Prince, Jr., 220 So. State Street, S. 1728, Chicago, Ill.
Poppenhusen, Johnston, Thompson & Raymond, 11 So. La Salle Street, Chicago, Ill.
John A. Sheean, 208 So. La Salle Street, Chicago, Ill.
Bryce L. Hamilton, 38 So. Dearborn Street, S. 1400, Chicago, Ill.
Sidley, McPherson, Austin & Burgess, 11 So. La Salle Street, Chicago, Ill.

Roy H. Johnson,
Clerk.

(Seal)

315 And on the same day, to wit, the 5th day of September, 1944, came the defendants-appellants, F. J. Williams, et al, by their attorneys and filed in the Clerk's office of said Court their certain Bond on Appeal, in words and figures following, to wit:

316 Bond No. 4743114.

Know All Men by These Presents:

That we, F. J. William, William Bishop, Paul M. Carter, M. J. Leach and Fred Lewis, as Principals, and Fidelity and Deposit Company of Maryland, a corporation licensed to do business in the State of Illinois, as Surety, are held and firmly bound unto O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox, in the penal sum of Two Hundred Fifty Dollars ($250.00), for the payment of which well and truly to be made we bind ourselves and our successors, jointly and severally, by these Presents.—

Witness our hands and seals this 29th day of August, A. D. 1944.

The Condition of the Above Obligation is Such That Whereas the said O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox, individually, and as members of the National Railroad Adjustment Board, did, on July 20, 1944, have entered in their favor a certain final order, judgment and decree in an action in the District Court of the United States, for the Northern District of Illinois, Eastern Division, No. 3788, entitled "The Order of Railway Conductors of America, et al, plaintiffs, *vs.* O. E. Swan, et al, defendants" in and by the terms of which a declaratory judgment was entered providing that the Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction, under the terms of Section 3, First (h) of the Railway Labor Act, to hear disputes involving yardmasters and assistant yardmasters, and to render awards in such disputes and that the First Division of the National Railroad Adjustment Board has no jurisdiction over such disputes and is not entitled to hear and render awards in the same; and, Whereas the said plaintiffs have perfected an appeal to

the Circuit Court of Appeals for the 7th Circuit by filing in the District Court on this date a Notice of Appeal;

Now, therefore, if the said Principals, plaintiffs in said cause, shall duly prosecute said appeal with effect, and moreover pay the amount of costs if the appeal is dismissed or the said judgment affirmed for any costs as may be awarded by said Circuit Court of Appeals if the judgment be modified, and to pay all costs on appeal as may be entered against said appellants; then the above obligation is to be void, otherwise to remain in full force and effect.

F. J. Williams,
William Bishop,
Paul M. Carter,
M. J. Leach,
Fred Lewis, as *Principals*,
By Leo J. Hassenauer,
Attorney-in-Fact.

Sealed and delivered
in presence of:
E. C. Klopf.

Fidelity & Deposit Company of Maryland,
By Julian S. Neal,
Agent and Attorney-in-Fact.

(Seal)

316½ State of Illinois, } ss.
County of Cook. }

I, Ronald W. Fuermann, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Julian S. Neal, Agent and Attorney-in-Fact for the Fidelity and Deposit Company of Maryland, who is personally known to me, appeared before me this day and acknowledged that he signed, sealed and delivered the foregoing instrument as his free and voluntary act as Agent and Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, and as the free and voluntary act of the Fidelity and Deposit Company of Maryland, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 29th day of August, A. D. 1944.

Ronald W. Fuermann,
Notary Public.

(Seal)

My commission expires February 16th, 1948.

317 And on the same day, to wit, the 9th day of November, 1944, came the appellants by their attorneys and filed in the Clerk's office of said Court their certain Statement of Points on Which They Rely, in words and figures following, to wit:

318 IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—3788) • •

STATEMENT OF POINTS ON WHICH APPELLANTS RELY.

To O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes, and J. M. Fox:

The Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President; Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President, plaintiffs above named, and F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach, and Fred Lewis, defendants above named, as appellants state that the point or points on which appellants intend to rely on the appeal are
318a the errors of the court in making and entering the Findings of Fact numbered 7 to 13, both inclusive, and in making the Conclusions of Law numbered 2, 4 and 5, and in holding and adjudicating and entering judgment that the Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction, under Section 3, First (h) of the Railway Labor Act, to hear disputes involving yardmasters and assistant yardmasters employed by rail carriers, and to render awards in such disputes, and that the First Division of the National Railroad Adjustment Board has no jurisdiction over such disputes and that it is not entitled to hear and render awards involving yardmasters, all as more specifically set forth in the Findings of Fact, Conclusions of Law, and Declaratory Judgment entered of record in this proceeding on July 20, 1944; the error of the court in its memorandum opinion filed July 9, 1944, and incorporated in and made a part of the said Findings of Fact, Conclusions of Law, and Declaratory Judgment entered July 20, 1944, with respect to each and all of the Findings of Fact and Conclusions of Law adverse to ap-

pellants, and, without in any manner limiting the foregoing, among other things the following:

(a) In holding, in said memorandum, that the decree in Cause No. 16031 "was entered by consent of the parties";

(b) The erroneous conclusion as expressed in said memorandum there was no direct conflict in the oral testimony as to whether or not a "yardmaster" was or was not within the group of "yard service employees";

318b (c) The erroneous conclusion that a "yardmaster" is a "yard superintendent" but not a "yard service employee";

(d) In holding and concluding that the Fourth Division of the Railroad Adjustment Board had, prior to the decree in Cause No. 16031, heard and determined yardmasters' cases;

(e) In considering and reaching his opinions and conclusions in said memorandum and in the Findings of Fact, Conclusions of Law, and Declaratory Judgment filed July 20, 1944, in holding and determining that the said Railway Labor Act, with respect to the jurisdiction of the First Division of the Railroad Adjustment Board, was ambiguous, and relying upon oral testimony, as to which there was a conflict, in reaching his Findings of Fact, Conclusions of Law, and Declaratory Judgment, as to the meanings of the terms therein used; and

(f) In failing to give any consideration or any weight to the "established practice" and decisions of the various boards of adjustment, as shown by the evidence, to which railroad carriers were parties, and the historical records of said boards in existence before the creation of the Railroad Adjustment Board, and subsequent thereto, which boards and the First Division of the Railroad Adjustment Board had taken jurisdiction, considered and determined cases involving yardmasters, and failing to give consideration to or considering paragraphs 23 and 25 of the Stipulation of Facts.

318c The court further erred in failing to hold and determine that "yardmasters" are "yard service employees," and that the First Division of the National Railroad Adjustment Board has exclusive jurisdiction to hear, try and determine disputes involving yardmasters, and that the Fourth Division of the National Railroad Adjust-

ment Board does not have jurisdiction to hear, try and determine disputes involving yardmasters.

Dated this 8th day of November, A. D. 1944.

V. C. Shuttleworth,
1120 Merchants National Bank Bldg.,
Cedar Rapids, Iowa,
W. A. Endle,
1322 Standard Bldg.,
Cleveland 13, Ohio,
Everett L. Gordon,
100 West Monroe Street,
Chicago, Illinois,
Attorneys for Plaintiffs.
Leo J. Hassenauer,
105 West Adams St., Chicago, Illinois,
Attorney for F. J. Williams, William Bishop, Paul M. Carter, M. J. Leack and Fred Lewis, certain Defendants.

319 And afterwards on, to wit, the 10th day of October, 1944, came the parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation, in words and figures following, to wit;

320 In the District Court of the United States
* * (Caption—3788) * *

STIPULATION RE: USE OF RECORD IN THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

It Is Hereby Stipulated and Agreed by counsel for the interested parties in the appeal in the above entitled proceedings that the originals of the entire record in accordance with the Designation of Record in the District Court shall be certified by the Clerk of the District Court to the United States Circuit Court of Appeals for the Seventh Circuit without the necessity of making a copy of such proceedings;

It Is Further Stipulated and Agreed that an order of court authorizing the Clerk of said District Court to trans-

mit said original record, in lieu of copies, may be entered without notice and the entry of such order is hereby consented to; it being understood, however, that this Stipulation does not, nor is it intended to cover or designate the portion or parts of the record in the foregoing proceeding to be printed after the appeal has been docketed in the United States Circuit Court of Appeals, Seventh Circuit.

Dated this 6th day of October, A. D. 1944.

V. C. Shuttleworth,
W. A. Endle,
E. L. Gordon,
Attorneys for Petitioners.

Leo J. Hassenauer,
Attorney for certain Defendants.

320a Sidley, Austin, Burgess & Harper,
Attorneys for certain Defendants.

Poppenhusen, Johnston, Thompson & Raymond,
Attorneys representing Railroad Yardmasters of America, Intervener.

Winston, Strawn & Shaw,
Representing Great Northern R. R. Co., Intervener.

John Sheean,
Representing Southern Pacific R. R. Co.

321 And afterwards, to wit, on the 12th day of October, 1944, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

322 IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—3788) • •

ORDER TO SEND TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT, THE ORIGINAL RECORD FILED IN THE OFFICE OF THE CLERK OF THE UNITED STATES DISTRICT COURT.

Pursuant to the Stipulation of the parties to the appeal from the order, judgment and decree of this court entered in this cause on July 20, 1944, that the Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction under the terms of Section 3, First (h), of the Railway Labor Act, to hear disputes involving yardmasters and assistant yardmasters and to render awards in such disputes and that the First Division of the National Railroad Adjustment Board has no jurisdiction under such disputes and is not entitled to hear and render awards in the same, It Is Ordered:

That the record of the proceedings in the District Court of the United States, as set forth in the Designation of the Record and filed in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, to be certified by the Clerk of the District Court to the United States Circuit Court of Appeals for the Seventh Circuit without the necessity of making a copy of any of such record; said record consisting of pleadings, transcript of evidence, exhibits and the decree of this Court entered July 20, 1944.

And the Clerk of this court is hereby and herewith authorized and directed to transmit as a part of the record on appeal said originals as set forth in the Designation of the Record in lieu of copies thereof, except as to all orders and the decree, copies of which are to be supplied to the Clerk of this court by appellants and counsel in this case are charged with the responsibility for the safe return of the original pleadings promptly after disposition of this cause in the Circuit Court of Appeals.

Enter:

Barnes,
Judge

Dated October 12, 1944.

323 And afterwards on, to wit, the 23rd day of October, 1944, there was filed in the Clerk's office of said Court a certain Designation of Appellees and Addresses of their Attorneys, in words and figures following, to wit:

324 IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—3788) * *

DESIGNATION OF APPELLEES AND NAMES AND ADDRESSES OF THEIR ATTORNEYS.

Pursuant to Rule 10 (3) of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit, the following original parties to the above-entitled cause, and the following intervenors therein, file this statement of their names as appellees, together with the names and addresses of their respective attorneys, for inclusion in the record on appeal from the order entered in said cause on July 20, 1944:

O. E. Swan,
T. K. Faherty,
R. A. Knoff,
L. L. McDonald,
L. O. Murdock,
Carrier members of the First Division of the National Railroad Adjustment Board, Defendants-Appellees,
H. J. Reeser,
J. W. Cox,
E. W. Fowler,
Carrier members of the Fourth Division of the National Railroad Adjustment Board, Defendants-Appellees,
Kenneth F. Burgess,
Douglas F. Smith,
Robert Diller,
11 South La Salle St.,
Chicago 3, Illinois.
Their Attorneys.

Of Counsel:
Sidley, Austin, Burgess & Harper,
11 South La Salle Street,
Chicago 3, Illinois.

324a

Great Northern Railway Company, *Intervenor-Appellee,*
R. J. Hagman,
Hallan Huffman,
Great Northern Railway Building, St. Paul 1, Minnesota,
Bryce L. Hamilton,
1400 First National Bank Building, Chicago 3, Illinois,
Its Attorneys.

Of Counsel:
Winston, Strawn & Shaw,
1400 First National Bank Bldg., Chicago 3, Illinois.

Southern Pacific Company, *Intervenor-Appellee,*
Burton Mason,
Southern Pacific Company, 65 Market St., San Farncisco 5, California,
John A. Sheean,
208 South La Salle St., Chicago 4, Illinois,
Its Attorneys.

Railroad Yardmasters of America, *Intervenor-Appellee,*
Anan Raymond,
11 South La Salle St., Chicago 3, Illinois,
Its Attorney.

Of Counsel:
Poppenhusen, Johnston, Thompson & Raymond, 11 South La Salle Street, Chicago 3, Illinois.

Dated October 23, 1944.

325 And afterwards on, to wit, the 9th day of November, 1944, came the parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation, in words and figures following, to wit:

326 IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—3788) • •

STIPULATION.

It Is Hereby Stipulated and Agreed by and between counsel for the respective parties to the above entitled cause, that the portions of the record, proceedings and evidence to be included in the record of appeal are those which are listed in Items 1 to 31, both inclusive, of the Designation filed by the Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President; Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President, plaintiffs, and F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach and Fred Lewis, defendants, dated October 11, 1944.

It Is Further Stipulated that the appellees waive the requirements of Section 75-A of the Rules of Civil Procedure with reference to further notice of the filing of the Designation of the portions of the record.

Dated this 8th day of November, A. D. 1944.

V. C. Shuttleworth,
W. A. Endle,
E. L. Gordon,
Attorneys for Appellants.
Sidley, Austin, Burgess & Harper,
Attorney for Carrier Members of the Railroad Adjustment Board.
Poppenhusen, Johnston, Thompson & Raymond,
Attorney for Railroad Yardmasters of America, Intervener.
John A. Sheean,
Attorney for Southern Pacific Company.
Bryce L. Hamilton,
Attorney for Great Northern Railway Company.
Leo J. Hassenauer,
Attorney for Labor Members, National Railroad Adjustment Board.

327 And on the same day, to wit, the 9th day of November, 1944, came the appellants by their attorneys and filed in the Clerk's office of said Court their certain Designation of Portions of Record, Proceedings and Evidence to Be Included in Record on Appeal, in words and figures following, to wit:

328 IN THE DISTRICT COURT OF THE UNITED STATES

* * (Caption—3788) * *

DESIGNATION OF THE PORTIONS OF THE RECORD, PROCEEDINGS, AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY JUDGMENT ENTERED ON JULY 20TH, 1944.

To the Honorable Roy H. Johnson, Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division:

The Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice President; Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President, plaintiffs above named, and F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach, and Fred Lewis, defendants above named, as appellants hereby designate, pursuant to Rule 75-A of the Rules of Civil Procedure, for the District Courts of the United States, the complete record, proceedings, and evidence in the above entitled action to be included in the record of appeal from the Findings of Fact, Conclusions of Law, and Declaratory Judgment entered July 20, 1944, consisting of the following:

329 (1) Petition for Declaratory Judgment and exhibits thereto, filed January 12, 1942.

(2) Answer to Petition for Declaratory Judgment filed by F. J. Williams, et al, on February 2, 1942.

(3) Answer to Petition for Declaratory Judgment filed by E. W. Fowler, et al, February 9, 1942.

(4) Petition and motion of Railroad Yardmasters of America for leave to intervene as a party defendant, filed February 9, 1942.

(5) Order granting leave to Railroad Yardmasters of America to intervene and file answer and counterclaim, entered February 9, 1942.

(6) Answer and Counterclaim of Railroad Yardmasters of America, filed February 9, 1942.

(7) Order granting leave to Southern Pacific Company to intervene and file answer, entered March 9, 1942.

(8) Order granting leave to Great Northern Railway Company to file answer, entered March 9, 1942.

(9) Answer of Great Northern Railway Company, filed February 24, 1942.

(10) Answer of Southern Pacific Company, filed March 11, 1942.

(11) Order granting leave to plaintiffs to make members of the Fourth Division of National Railroad Adjustment Board additional parties defendant and file Amended Petition, entered April 10, 1942.

(12) Amendment to the Petition for Declaratory Judgment, filed April 10, 1942.

(13) Order granting leave to Great Northern Railway Company to file answer to petition as amended, entered April 22, 1942.

(14) Answer of Great Northern Railway Company to petition as amended, filed April 22, 1942.

(15) Answer of defendants, E. W. Fowler, et al, to petition as amended, filed April 16, 1942.

(16) Order granting leave to Southern Pacific Company to file instanter its supplemental answer to the Complaint as amended, filed May 8, 1942.

(17) Answer of Southern Pacific Company to petition as amended, filed May 8, 1942.

(18) Answer of E. J. Hamner, et al, filed June 10, 1942.

(19) Plaintiffs' reply to counterclaim of Railroad Yardmasters of America, filed October 30, 1942.

(20) Plaintiffs' reply to counterclaim of E. W. Fowler, et al, filed October 30, 1942.

330 (21) Stipulation of Facts, filed August 6, 1943.

(22) All exhibits filed.

(23) Transcript of Evidence.

(24) Memorandum opinion of Judge Holly, filed June 9, 1944.

(25) Order substituting certain defendants, entered July 12, 1944.

(26) Findings of Fact, Conclusions of Law, Declaratory Judgment, entered July 20, 1944.

(27) Notices of Appeal, with date of filing and proof of service.

(28) Appeal Bonds.

(29) Statement of points on which appellants rely.

(30) Designation of contents of record on appeal, with proof of service.

(31) Clerk's Certificate.

You are hereby requested to certify the complete record and all the proceedings and evidence in said action as set forth above, to the United States Circuit Court of Appeals, for the Seventh Circuit, within the time allowed by law.

Dated October 11th, 1944.

V. C. Shuttleworth,
W. A. Endle,
E. L. Gordon,
100 West Monroe St., Chicago, Illinois.
Attorneys for Plaintiffs.
Leo J. Hassenauer,
105 West Adams St., Chicago, Illinois.
Attorney for F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach and Fred Lewis, certain Defendants.

331 Northern District of Illinois, } ss.
Eastern Division. }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Designation filed in this court in the cause entitled: The Order of Railway Conductors of America, et al, *vs.* E. W. Fowler, et al, Civil Action No. 3788, consisting of the original documents filed of record and copies of orders as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in the City of Chicago, in said district, this tenth day of November, A. D. 1944.

Roy H. Johnson,
Clerk.

(Seal)

332 And to-wit, on the 28th day of November, 1944, the following further proceedings were had and entered of record, to-wit:

November 28, 1944.

8714-8715

(Caption)

Before: Hon. William M. Sparks, *Circuit Judge.*

It is ordered that the stipulation of counsel as to printing the record herein be, and it is hereby, approved.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, printed under my supervision and filed on the seventh day of May, 1945, in:

Cause Nos. 8714-8715.

The Order of Railway Conductors of America, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President and S. R. Harvey, Assistant President,

Plaintiffs-Appellants,

vs.

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,

Defendants-Appellees.

F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach, and Fred Lewis, individually, and as members of the National Railroad Adjustment Board,

Defendants-Appellants,

vs.

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,

Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 8th day of March, A. D. 1946.

(signed) Kenneth J. Carrick,
(seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the third day of October, in the year of our Lord one thousand nine hundred and forty-four, and of our Independence, the one hundred and sixty-ninth.

The Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice-President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President,
Plaintiffs-Appellants,

8714 *vs.*

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,
Defendants-Appellees.

F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach, and Fred Lewis, Individually, and as members of the National Railroad Adjustment Board,
Defendants-Appellants,

8715 *vs.*

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,
Defendants-Appellees.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the fifteenth day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellants in Cause No. 8714, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8714.

The Order of Railway Conductors of America and Brotherhood of Railroad Trainmen,
Plaintiffs-Appellant,

vs.

O. E. Swan et al.,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for Plaintiffs-Appellants.

V. C. Shuttleworth,
Cedar Rapids, Iowa.

W. A. Endle,
General Offices,
Cleveland, Ohio.

Everett L. Gordon,
100 W. Monroe St.,
Chicago, Illinois.

Endorsed: Filed November 15, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the fifteenth day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellants in Cause No. 8715 which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8715.

The Order of Railway Conductors of America and Brotherhood of Railroad Trainmen,
Plaintiffs-Appellants,

vs.

O. E. Swan, et al.,
Defendants-Appellees.

The Clerk will enter my appearance as counsel for F. J. Williams, William Bishop, Paul M. Carter, Fred Lewis and M. G. Leach, Defendants-Cross Appellants.

Leo J. Hassenauer,
38th Floor,
105 W. Adams St.,
Chicago (3), Illinois.

Endorsed: Filed November 15, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twenty-second day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee in Cause No. 8714 which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8714.

The Order of Railway Conductors, *et al.*,
Plaintiffs-Appellants,

vs.

O. E. Swan, *et al.*,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, and L. O. Murdock, carrier members of First Division of N.R.A.B., and H. J. Reeser, J. W. Cox, and E. W. Fowler, carrier members of Fourth Division of N.R.A.B.

Kenneth F. Burgess,
11 S. La Salle St.,
Chicago 3, Ill.

Douglas F. Smith,
11 S. La Salle St.,
Chicago 3, Ill.

Robert Diller,
11 S. La Salle St.,
Chicago 3, Ill.

Endorsed: Filed November 22, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee in Cause No. 8715 which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8715.

F. J. Williams, *et al.*,
Defendants-Appellants,

vs.

O. E. Swan, *et al.*,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, and L. O. Murdock, carrier members of First Division of N.R.A.B., and H. J. Reeser, J. W. Cox, and S. W. Fowler, carrier members of Fourth Division of N.R.A.B.

Kenneth F. Burgess,
11 S. La Salle St.,
Chicago 3, Ill.

Douglas F. Smith,
11 S. La Salle St.,
Chicago 3, Ill.

Robert Diller,
11 S. La Salle St.,
Chicago 3, Ill.

Endorsed: Filed November 22, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee in Cause No. 8714 which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8714.

The Order of Railway Conductors, et al.,
Plaintiffs-Appellants,

vs.

O. E. Swan, et al.,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for Great Northern Railway Company, Intervenor-Appellee.

R. J. Hagenan,
Great Northern Railway Bldg.,
St. Paul 1, Minnesota.

Hallan Huttman,
Great Northern Railway Bldg.,
St. Paul 1, Minnesota.

Bryce L. Hamilton,
1400 First National Bank Bldg.,
Chicago 3, Illinois.

Endorsed: Filed November 22, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee in Cause No. 8715 which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8715.

F. J. Williams, et al.,
Defendants-Appellants,

vs.

O. E. Swan, et al.,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for Great Northern Railway Company, Intervenor-Appellee.

R. J. Hagman,
Great Northern Railway Bldg.,
St. Paul 1, Minnesota.

Hallan Huttman,
Great Northern Railway Bldg.,
St. Paul 1, Minnesota.

Bryce L. Hamilton,
1400 First National Bank Bldg.,
Chicago 3, Illinois.

Endorsed: Filed November 22, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee in Cause No. 8714 which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8714.

The Order of Railway Conductors, et al.,
Plaintiffs-Appellants,

vs.

O. E. Swan, et al.,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for Southern Pacific Company, Intervenor-Appellee.

Burton Daron,
65 Market Street,
San Francisco 5, California.

John A. Sheean,
208 S. La Salle Street,
Chicago 4, Illinois.

Endorsed: Filed November 22, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee in Cause No. 8715, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8715.

F. J. Williams, et al.,
Defendants-Appellants,

vs.

O. E. Swan, et al.,
Defendants-Appellees.

The Clerk will enter our appearance as counsel for Southern Pacific Company, Intervenor-Appellee.

Burton Daron,
65 Market Street,
San Francisco 5, California.

John A. Sheean,
208 S. La Salle Street,
Chicago 4, Illinois.

Endorsed: Filed November 22, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-second day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee in Cause No. 8714, which said appearance is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Seventh Circuit.

The Order of Railway Conductors, et al., *Plaintiffs-Appellants, vs.* O. E. Swan, et al., *Defendants-Appellees.*	No. 8714.

APPEARANCE OF RAILROAD YARDMASTERS OF AMERICA, INTERVENOR-APPELLEE.

The undersigned hereby enters the appearance of Railroad Yardmasters of America, intervenor-appellee, as appellee in the above case and of himself as its attorney.

Anan Raymond,
Attorney for Intervenor-Appellee.

Poppenhusen, Johnston, Thompson & Raymond,
Of Counsel.

Endorsed: Filed November 22, 1944. Kenneth J. Carrick, Clerk.

An on the same day, to-wit: On the twenty-second day of November, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee in Cause No. 8715, which said appearance is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Seventh Circuit.

F. J. Williams, et al.,
Defendants-Appellants,
vs.
O. E. Swan, et al.,
Defendants-Appellees.
} No. 8715.

APPEARANCE OF RAILROAD YARDMASTERS OF AMERICA, INTERVENOR-APPELLEE.

The undersigned hereby enters the appearance of Railroad Yardmasters of America, intervenor-appellee, as appellee in the above case and of himself as its attorney.

Anan Raymond,
Attorney for Intervenor-Appellee.

Poppenhusen, Johnston, Thompson & Raymond,
Of Counsel.

Endorsed: Filed November 22, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the nineteenth day of October, 1945, the following further proceedings were had and entered of record, to-wit:

Friday, October 19, 1945.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Order of Railway Conductors of America, H. W. Fraser, President and F. H. Menitz, Senior Vice-President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President,
Plaintiffs-Appellants,

8714 *vs.*

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,
Defendants-Appellees.

F. J. Williams, William Bishop, Paul M. Carter, J. J. Leach, and Fred Lewis, Individually, and as members of the National Railroad Adjustment Board,
Defendants-Appellants,

8715 *vs.*

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,
Defendants-Appellees.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. V. C. Shuttleworth and Mr. Leo Hassenauer, counsel for appellants, and by Mr. Douglas F. Smith and Mr. Anan Raymond, counsel for appellees, and the Court takes this matter under advisement.

And afterwards, to-wit: On the twenty-first day of December, 1945, there was filed in the office of the Clerk of this Court, the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 8714, 8715. October Term and Session, 1945.

No. 8714.

The Order of Railway Conductors of America, H. W. Fraser, President, and F. H. Nemitz, Senior Vice-President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President,
Plaintiffs-Appellants,

vs.

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,
Defendants-Appellees.

No. 8715.

F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach, and Fred Lewis, Individually, and as members of the National Railroad Adjustment Board,
Defendants-Appellants,

vs.

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,
Defendants-Appellees.

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

December 21, 1945.

Before EVANS, SPARKS and KERNER, *Circuit Judges.*

SPARKS, *Circuit Judge.* Plaintiffs instituted this action under general federal equity jurisdiction, for a declaratory

judgment, pursuant to § 274d(1) of the Judicial Code, 28 U. S. C. A. § 400(1). They sought to have the First Division of the National Railroad Adjustment Board declared to have exclusive jurisdiction of disputes involving railroad yardmasters, within the terms and definitions of § 3(h) of the Railway Labor Act of May 20, 1926, as amended June 21, 1934. This Act created the National Railroad Adjustment Board for the adjustment of disputes between the carriers and their employees. It consists of thirty-six members, grouped in four divisions, and the Act provides that the proceedings of each division shall be independent. The constituency and jurisdiction of each division are fixed by the statute. 45 U. S. C. A. § 153(h). Only the first and fourth divisions are involved here.[1]

The only issue here involved is whether yardmasters shall be included in the first or fourth division. It is admitted that they can not be classified properly in either the second or third division, and if they can not be included in the first they must be included in the fourth division. The District Court held that they could not be classified properly in the first division, and assigned them to the fourth division. From that decree this appeal is prosecuted.

The decisive question here is whether yardmasters are "yard-service employees" as that term is used in the first division. Findings 7 to 13 inclusive are supported by substantial evidence and are as follows:

> 7. "Yardmasters and assistant yardmasters are not train-service or yard-service employees of rail carriers; that is to say, they are not engineers, firemen, hostlers, outside hostler helpers, conductors, trainmen, or yard-service employees.
>
> 8. "The terms 'yard service' and 'yard-service employees' are not terms in general and common usage in the English language.
>
> 9. "The terms 'yard service' and 'yard-service employees' are and have been for many years, both

1. "First Division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. • • •."

"Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second and third divisions. • • •."

prior and subsequent to the amendment of the Railway Labor Act in 1934, technical terms in railroad usage, with definite meanings clearly understood by persons familiar with that usage.

10. "The term 'yard-service employees,' as used in Section 3 First (h) of the Railway Labor Act with reference to the jurisdiction of the First Division of the National Railroad Adjustment Board, was taken by Congress from railroad usage and was introduced into the said statute upon its amendment in 1934 as a railroad term having the meaning customarily assigned to it in railroad parlance.

11. "At the time of the amendment to the Railway Labor Act referred to in the preceding paragraph 10, for many years prior thereto, and since that time, the term 'yard-service employees' referred, and has referred, solely to railroad employees engaged in making up and breaking up trains and switching trains and cars within yard limits. Over the same period of time the term 'yard service' has denoted the work performed by such employees, who include engineers, firemen, conductors or engine foremen, yard brakemen or switchmen, and switchtenders.

12. "During the period of time referred to in the preceding paragraph 11, the terms 'yard service' and 'yard work' have been synonymous and have been used interchangeably in railroad parlance, and the terms 'yard-service employees' and 'yard men' have been synonymous and used interchangeably in railroad parlance.

13. "Railroad usage, as evidenced by the testimony of experienced railroad officials and representatives of railroad employees, has never included yardmasters and assistant yardmasters within the meaning of the terms 'yard-service employees' or 'yard men,' and yardmasters and assistant yardmasters have never been regarded as yard-service employees or yard men."

A study of this record convinces us that the District Court, in holding that yardmasters were not included in Division 1, did not give to the Act a strained or narrow interpretation contrary to the meaning of its terms. In support of their contention to the contrary, plaintiffs rely on *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349, and *United States* v. *Cooper Corporation*, 312

U. S. 600. In both of those cases the court declined to extend the terms there used beyond their natural and ordinary meaning, and that is precisely the thing that was done in the case at bar. The testimony of all the witnesses did not differ materially with respect to the definition of "yard-service employees" as used by those engaged in the railroad business, and the court's finding adopted that definition. True, plaintiffs' one witness stated: "I would say that they (yardmasters) fit more nearly in with the yard-service employees than with any other class." However, he did not deny the accuracy of the definition of the terms "yard-service employees" as given by all other witnesses testifying on this subject. Of course, the construction of a statute involves a question of law. However, the definitions of words, either common or technical, involve questions of fact, and we are bound by the court's findings as to the definitions if they are supported by substantial evidence.

Aside from the testimony of witnesses on this subject, plaintiffs contend that the court erred in failing to give any weight to the historical alignment of yardmasters with the train and yard-service crafts in the settlement of disputes before boards of adjustment.

During the period of federal control of railroads (1918-1920), the basis of Railway Board of Adjustment No. 1, was an agreement between the regional directors of the railroads, and representatives of four labor organizations of railway conductors, railroad trainmen, locomotive engineers, and locomotive firemen and enginemen. A similar agreement was made by the regional directors and representatives of six labor organizations of shop employees, and this constituted the basis for Board of Adjustment No. 2. A like agreement was made with four labor organizations: Switchmen, Railroad Telegraphers, Railway Clerks, and Maintenance-of-way employees, which was the basis for Board of Adjustment No. 3. The jurisdiction of each board was to adjust personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of the railroad and its employees, covered by the several respective agreements. Thus no provision was made for submission of disputes of employees who did not belong to one of the organizations named in the agreements. However, provision for adjustment of the disputes of such employees

was made by Circular No. 3 of the Division of Labor of the United States Railroad Administration, which contained the following paragraph:

> "(c) When employees are represented by Railway Boards of Adjustment, the procedure as to all controversy within the scope of their duties will be as directed in general orders creating such boards. The fact that certain employees are not represented by Railway Boards of Adjustment will in no manner deprive them of any of the benefits accruing from such boards. An assistant to the Director * * * has been appointed, and a staff of representatives has been organized, for the * * * purpose of rendering the same service to such employees as though represented by a Railway Board of Adjustment. * * *"

This circular further provided for the method of handling requests for adjustments in wages by employees not represented by Railway Boards of Adjustment and personal grievances or controversies arising under the interpretation of wage agreements and all other disputes arising between officials of a railroad and its employees not represented by Railway Boards of Adjustment. If not settled on the property, such disputes were referable to the Director of the Division of Labor of the United States Railroad Administration.

During this period the disputes of yardmasters were referable to no less than three separate adjustment bodies, national in scope. If a yardmaster belonged to one of the four brotherhoods represented on Board No. 1, he went to that Board; if he belonged to the Switchmen's Union, he went to Board No. 3; but if he belonged to an organization not represented on one of the three boards, or to no labor organization, he went to a special staff in the Division of Labor.

Jurisdiction to hear and decide all disputes during this period, those of yardmasters, yard-service employees, and all other employees, depended not upon a classification according to crafts or jobs, as it does now, but upon labor representation.

The Transportation Act of 1920 superseded the arrangements set up during the period of federal control. Under this Act, adjustment boards were authorized to be created by agreement. The jurisdiction of such boards extended

only to the disputes of employees represented on that board. Neither the Switchmen's Union, nor the Railroad Yardmasters of America were parties to any of those agreements and if any of their disputes were heard by those boards it was due solely to the fact that such member or members happened to hold membership in the signatory labor organizations, and such jurisdiction was not based on a classification of work or crafts, nor was it based on any administrative interpretation of the term "yard-service employees" as including yardmasters. The adjustment jurisdiction of the Labor Board was confined neither to the disputes of specified crafts only, nor to the disputes of any particular labor organization. The Labor Board was directed to hear and decide any dispute involving grievances, rules, or working conditions on which an adjustment board had deadlocked, if the adjustment board certified the deadlock to the Labor Board. The Labor Board was also authorized to act on its own motion in case it determined that an adjustment board had deadlocked or failed to consider a dispute with due diligence, and it was authorized to handle disputes in the first instance in cases where an appropriate adjustment board had not been organized.

The Railway Labor Act of 1926 also directed that boards of adjustment should be created by agreement, and such agreement was required to specify the group or groups covered by the adjustment board.

That Act also authorized individual carriers and their employees to enter into adjustment agreements, and under this Act, boards previously established were continued, and the number of such boards was increased; under it, as under the previous Act, the only yardmasters' and yard-service employees' disputes heard by such adjustment boards were those of members of the four brotherhoods. Large numbers of yard-service employees, such as those belonging to the Switchmen's Union, were not subject to the jurisdiction of the Train Service Boards of Adjustment, because they had no membership in the signatory unions, and for the same reason only a few of the yardmasters were subject to that jurisdiction.

Under the Act of 1934, the jurisdiction of the Adjustment Board is not determined by representation or left to agreement; it is defined strictly in terms of disputes involving specified classes of employees, regardless of the

labor affiliations of the members of the several classes. Under the present law, the several divisions of the National Adjustment Board were not created by signed agreement, but by statute which contains not a word to imply that the Order of Railway Conductors and the Brotherhood of Railroad Trainmen may, or that the members of the Railroad Yardmasters must submit their disputes to the First Division.

In view of these facts we think the District Court was correct in concluding that the historical alignment of yardmasters with the train and yard-service crafts in the settlement of disputes is not helpful in determining the question now before us.

Plaintiffs further contend that the court erred in failing to give weight to the contemporaneous administrative interpretation of the Adjustment Board. In support of that contention they rely on nineteen decisions of that Board, only three of which, we think, relate to disputes involving yardmasters in the proper sense of that term. In one, a yardmaster complained of wrongful demotion to a yardman position; in another he complained of wrongful discharge; and in another he complained of wrongful displacement by another yardmaster, claiming rate of payment under one agreement rather than another. In none of these awards was there any discussion of the jurisdictional question depending upon the interpretation of "yard-service employees." The award merely recited, as in all awards: "This Division of the Adjustment Board has jurisdiction over the dispute involved herein."

Whenever the question involved in this case has been given specific attention the First Division has deadlocked. The labor members wished to accept yardmaster cases, and carrier members refused. In the Fourth Division, except as we shall note, the carrier members favored taking yardmasters' cases, and the labor members objected, and this situation has existed for a considerable length of time, and for this reason the present suit was instituted.

The exception last above noted was a case in which a petition for mandamus was filed by the Railroad Yardmasters of America against members of the Fourth Division, and prayed that an order be entered commanding them to hear and determine certain disputes mentioned in the petition. Summons was issued, the defendants appeared and filed answer admitting they were members of

the Fourth Division, and that they were of the opinion that said Division had jurisdiction of such disputes. The decree enjoined and commanded the Fourth Division to docket, order the determination and enter awards on three *ex parte* submissions involving yardmasters theretofore filed with the Fourth Division. That decree was entered by Judge Holly without argument and without information that there was a public question involved or that anyone aside from the parties had any interest in the question then presented. It is noted here only for the reason that the Railroad Yardmasters of America, intervenor here, contends that the decree in that case is *res adjudicata* of the issues now presented, and asks that the decree now before us be affirmed. We think the District Court ruled correctly in holding it was not *res adjudicata* as to the issues now presented.

Under the facts related we are of opinion that the alleged contemporaneous administrative interpretation adds no weight to plaintiffs' contention. Administrative interpretation is resorted to only when the statute is ambiguous. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269; *Koshland* v. *Helvering*, 298 U. S. 441. In cases where it is proper to consider, there must have been definite and unequivocal administrative action on a question of the type under consideration, and it must be authoritative in character, uniform, consistent, and long-continued. *United States* v. *Missouri Pacific R. Co., supra; Higgins* v. *Commissioner*, 312 U. S. 212; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1; and *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627. An administrative interpretation contrary to the plain meaning of the statute, though of long standing, is never accepted by the courts. *Texas & Pacific Ry. Co.* v. *United States, supra; Koshland* v. *Helvering, supra; Estate of Sanford* v. *Commissioner*, 308 U. S. 39; and *City Bank Farmers Trust Co.* v. *Helvering*, 313 U. S. 121.

Plaintiffs further contend that the trial court erred in failing to give weight to the failure of Congress to amend the Railway Labor Act. At two different times a bill was introduced into Congress to amend the Railway Labor Act in such manner as to exclude yardmasters' disputes from the jurisdiction of the First Division. Both bills went to the Committee and were never reported out. Whether their demise by that method was due to the fact that the Committee thought they were undesirable or un-

necessary we are not informed, and no presumption arises as to the cause.

Decree AFFIRMED.

Endorsed: Filed December 21, 1945. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the twenty-first day of December, 1945, the following further proceedings were had and entered of record, to-wit:

Friday, December 21, 1945.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

The Order of Railway Conductors of America, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President, and S. R. Harvey, Assistant President, *Plaintiffs-Appellants;*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
8714 *vs.*	
O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox, *Defendants-Appellees.*	

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause appealed from be, and the same is hereby affirmed, with costs.

And on the same day, to-wit: On the twenty-first day of December, 1945, the following further proceedings were had and entered of record, to-wit:

Friday, December 21, 1945.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

F. J. Williams, William Bishop, Paul M. Carter, J. J. Leach, and Fred Lewis, Individually, and as members of the National Railroad Adjustment Board,
Defendants-Appellants,

8715 *vs.*

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,
Defendants-Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs.

And afterwards, to-wit: On the twenty-fourth day of January, 1946, the mandate of this Court in cause No. 8714 issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

And on the same day, to-wit: On the twenty-fourth day of January, 1946, the mandate of this Court in cause No. 8715 issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Garrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of proceedings had and papers filed excepting briefs of counsel and motion and orders extending time for briefs, in:

Cause Nos. 8714-8715.

The Order of Railway Conductors of America, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President and S. R. Harvey, Assistant President,

Plaintiffs-Appellants,

vs.

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,

Defendants-Appellees.

F. J. Williams, William Bishop, Paul M. Carter, J. J. Leach, and Fred Lewis, individually, and as members of the National Railroad Adjustment Board,

Defendants-Appellants,

vs.

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox,

Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit at the City of Chicago, this 8th day of March, A. D. 1946.

(seal)

(signed) Kenneth J. Garrick
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 63

ORDER ALLOWING CERTIORARI—Filed April 22, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 64

ORDER ALLOWING CERTIORARI—Filed April 22, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

MAR 18 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1945

No. 969 - 63 - 64

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and BROTHERHOOD OF RAILROAD TRAINMEN, A. F. Whitney, President and S. E. Harvey, Assistant President, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents.* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, AND FRED LEWIS, Individually, and as Members of the National Railroad Adjustment Board, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents.* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

V. C. SHUTTLEWORTH
H. E. WILMARTH,
Merchants Bank Bldg., Cedar Rapids, Iowa
W. A. ENDLE,
1322 Standard Bldg., Cleveland, Ohio.
EVERETT L. GORDON,
100 West Monroe St., Chicago, Illinois.
Attorneys for Order of Railway Conductors of America and Brotherhood of Railroad Trainmen, Petitioners.
LEO J. HASSENAUER,
105 West Adams St., Chicago, Illinois.
Attorney for F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach, and Fred J. Lewis, Respondents.

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IN THE

Supreme Court of the United States

October Term, 1945

No.

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and BROTHERHOOD OF RAILROAD TRAINMEN, A. F. Whitney, President and S. R. Harvey, Assistant President, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents.* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, AND FRED LEWIS, Individually, and as Members of the National Railroad Adjustment Board, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents.* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the

United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on the 21st day of December, 1945.

OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in 152 F(2d) 325.

JURISDICTION

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

STATUTE INVOLVED

The pertinent provisions of the Railway Labor Act, as amended by the Act of June 21, 1945 (45 U. S. C., Sec. 151, et seq.) are set forth in the appendix to this petition.

STATEMENT OF THE MATTER

Prior to August, 1941, the First Division of the National Railroad Adjustment Board assumed jurisdiction, pursuant to the provisions of Section 3, First (h) of the Railway Labor Act, of disputes involving railroad yardmasters and rendered awards in such disputes (R. 230).[1]

On March 21, 1938, the Railroad Yardmasters of America, intervenor herein, filed the disputes of three individual yardmasters with the Fourth Division of the Adjustment Board (R. 231). The carrier and labor members of the Fourth Division deadlocked on the question of the jurisdiction of that division to hear these cases (R. 231, 174, 175). Thereupon, the Railroad Yardmasters of America brought action in the United States District Court for the Northern District of Illinois, Eastern Division, against the

[1] Unless otherwise indicated, all references are to the record in the United States Circuit Court of Appeals.

members of the Fourth Division for a writ of mandamus commanding the Fourth Division to docket and hear the three submissions (R. 158). The members of the First Division were not made parties to the action (R. 158). The carrier members of the Fourth Division filed answer admitting the allegations of the petition (R. 175). No answer was filed by the labor members of the Fourth Division (R. 177). On July 11, 1938, the District Court, Honorable William H. Holly presiding, entered its decree, known in this record as Chancery No. 16031, holding that the Fourth Division had exclusive jurisdiction of yardmaster disputes and ordering that division to hear the three disputes submitted to it (R. 176, 181).

In this action, the Railroad Yardmasters of America plead the decree in Chancery No. 16031 as a final and binding adjudication of the issues raised by the petitioners (R. 115). Both the District Court and the Circuit Court of Appeals held it not to be res adjudicata, the trial court stating in its memorandum opinion that the decree had been induced *by collusion of the parties and without any consideration of the issues involved* (R. 224).

Following the entry of decree in Chancery No. 16031 on July 11, 1938, and based thereon, the Fourth Division assumed jurisdiction to hear and render awards in disputes involving yardmasters submitted to it (R. 231). The First Division likewise *continued* to assert jurisdiction over yardmaster disputes until August, 1941 (R. 230, 231).

On August 28, 1941, the five carrier members of the First Division of the Adjustment Board directed a letter to the five labor members of that division stating that in view of the decree in Chancery No. 16031 of July 11, 1938, the carrier members of the First Division would not agree to set yardmaster cases docketed with it for hearing. The letter proposed that these cases and similar disputes and submissions arising in the future be docketed with the Fourth Division "since it appears that by the terms of the amended Railway Labor Act, as construed by the District

Court of the Northern District of Illinois, Eastern District, jurisdiction over the subject matter of each of the aforecited dockets is vested in the Fourth Division." The carrier members did not state, however, that yardmasters were not "yard-service employees" within their own understanding of that term (R. 27-29).

Since August 28, 1941, the carrier members and the labor members of the First Division have been deadlocked on the question of the jurisdiction of that division over disputes involving yardmasters, and such disputes docketed with the First Division by the petitioners remain unconsidered and unadjusted (R. 231).

The single issue presented in the District Court and to the Circuit Court of Appeals was whether Congress intended to use the term "yard-service employees" in Section 3, First (h) of the Railway Labor Act as inclusive of the craft and class of yardmaster employees, as well as other yard-service crafts, so as to confer jurisdiction on the First Division of the Adjustment Board. It was not disputed that yardmasters are "employees" within the meaning of the Act.

The classes or crafts of railroad employees who perform yard work include engineers, firemen, hostlers, conductors, brakemen, flagmen, baggagemen, switch tenders, yard helpers and others. All of these employees are supervised by a yardmaster in performing yard work, such as switching, making and breaking up trains, storing cars, and moving trains into, out of and through the yard (R. 162-169, 77-88).

In interpreting Section 3, First (h) of the Railway Labor Act, the District Court and the Circuit Court of Appeals ignored documentary proof of the general use in the industry of the term "yard-service employees" as inclusive of yardmasters, the object of the Act as shown by its design and scheme, and concluded further that the historical background of the Act, its administrative construction, and the rejection of amendments proposed in Congress designed to exclude yardmasters' disputes from the jurisdiction of the

First Division, were valueless in arriving at the intent of Congress.

The District Court, in holding that yardmasters were not in "yard-service," relied entirely upon the *oral testimony* of three railroad executives who testified for the respondents to the effect that within their experience and knowledge "yard-service employees" did not include yardmasters (R. 191, 196, 197). This testimony was directly contradicted by oral testimony offered in rebuttal by the petitioners (R. 211, 213).

The Circuit Court of Appeals held that the oral evidence relied upon by the trial court supported findings of fact 7 to 13 inclusive,[2] in which the trial court "defined" the term "yard-service employees" as not including yardmasters, and concluded that it was "bound" by the findings. The judgment of the Circuit Court rests on this conclusion alone for it also ignored or rejected the design and scheme of the Railway Labor Act, its historical background, its administrative construction, and congressional disapproval of proposed amendments as not indicative of the intent of Congress.

The facts in this case which warrant the issuance of a writ of certiorari are:

1. The First Division of the Adjustment Board has been deprived of jurisdiction of yardmaster disputes by an interpretation of the Railway Labor Act based solely on *conflicting oral testimony* as to the meaning of the term "yard-service employees" as used in Section 3, First (h) of the Act.

2. The Interstate Commerce Commission, the Railroad Retirement Board, the National Railroad Adjustment Board, the National Mediation Board, the 1943 Emergency Board appointed under the Railway Labor Act, the Train Service Board of Adjustment for the Western Region, and the Director-General of Railroads in World War I have in

[2] The petitioners did not challenge findings of fact number 1 through 6 on the appeal to the Circuit Court.

official documents repeatedly recognized the term "yard-service employees" as specifically inclusive of yardmasters.

3. At the time of the enactment of the 1934 amendments yardmasters had been traditionally aligned with the train and yard-service crafts for submission of their disputes to boards of adjustment created by the Director-General of Railroads in World War I, under the Transportation Act of 1920, and under the Railway Labor Act of 1926.

4. The administrative construction placed on Section 3, First (h) of the Railway Labor Act by the First Division in accepting yardmaster disputes prior to 1941 is held without weight in ascertaining the intent of Congress, although the First Division, composed of ten representatives of the rail carriers and the transportation brotherhoods, all expert in railroad terminology throughout the United States and thoroughly familiar with the history of the boards of adjustment prior to the 1934 amendments, repeatedly held that it had jurisdiction in such cases.

5. The decision throws the disputes of an important *rail* craft to a board composed of representatives of *water* carriers and *maritime* unions contrary to the basic object of this section of the Railway Labor Act.

6. Two bills have been introduced in Congress by the American Short Line Railroad Association designed to *exclude* such disputes from the jurisdiction of the First Division and both were *rejected* by the Congressional committees to which they were referred.

QUESTION PRESENTED

Does the First Division of the National Railroad Adjustment Board have jurisdiction over disputes involving railroad yardmasters within the meaning of Section 3, First (h) of the Railway Labor Act, as amended?

REASONS FOR GRANTING THE WRIT

1. The Circuit Court has construed the Railway Labor Act solely on the basis that it was bound by the trial court's findings drawn from conflicting oral testimony of the witnesses' own understanding of the meaning of a term used in the Act, contrary to conclusive documentary evidence of the established use and acceptance of the term by the industry and contrary to recognized rules for statutory interpretation announced by this court in numerous decisions and particularly in this court's decisions in:

MacEvoy vs. United States, 322 U. S. 102
Great Northern Railway Co. vs. United States, 315 U. S. 262
Federal Trade Commission vs. Bunte Bros., Inc., 312 U. S. 349
United States vs. Cooper Corp., 312 U. S. 600
Norwegian Nitrogen Products Co. vs. United States, 288 U. S. 294.

2. The decision is the first binding interpretation of the jurisdiction of the several divisions of the Adjustment Board as defined by Section 3, First (h) of the Railway Labor Act. It creates narrow jurisdictional distinctions between the several divisions of the Board which must inevitably foster future conflict and hamper the Board in the exercise of its functions.

3. The decision throws the disputes of an important rail operating craft governed by technical agreements concerning rates of pay, rules and working conditions to the jurisdiction of a division of the Board formed to hear the disputes of marine carriers and their employees, thereby destroying in part the basic object in the formation of the Board.

4. The decision casts doubt on the validity of many awards by the divisions of the Board involving employees

whose duties are of a supervisory character, including many awards in yardmaster disputes by the First Division.

5. The decision will tend to promote industrial strife among employees engaged in the rail transportation industry in the United States by undermining their confidence in the procedures for the settlement of their disputes under the Railway Labor Act.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1945

No.

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and BROTHERHOOD OF RAILROAD TRAINMEN, A. F. Whitney, President and S. R. Harvey, Assistant President, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents.* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, AND FRED LEWIS, Individually, and as Members of the National Railroad Adjustment Board, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents.* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PRELIMINARY STATEMENT

We refer to the foregoing petition for a citation of the opinion below, a statement of the grounds of jurisdiction,

a citation of the statute involved and a summary statement of the case.

ARGUMENT

This case involves the interpretation of an Act of Congress which is the product of fifty years of legislation in the field of rail carrier labor relations. Nevertheless, the Circuit Court held that it was "not helpful in determining the question" to consider or give weight to the historical background of the 1934 amendments to the Railway Labor Act creating the Adjustment Board. Nor did it give weight to the administrative construction of the act by ten rail carrier experts on the First Division, or the failure of Congress to act on proposed amendments to the act designed to exclude yardmaster disputes from the jurisdiction of the First Division. Further, the Circuit Court ignored entirely the scheme and design of the statute which clearly defined the object and purpose of Congress to provide a board the separate divisions of which would be expert in the handling of particular types of disputes.

The result is that yardmaster disputes are thrown to the Fourth Division on the sole basis of the opinion of the circuit court that it was bound by the findings of the trial court as to the "definition" of the term "yard-service employees"; and this "definition" is in turn derived solely from *conflicting oral testimony* of four witnesses who testified as to their understanding of the meaning of the term in the industry.

We respectfully submit that the Circuit Court followed an unprecedented course in arriving at an interpretation of the jurisdiction which Congress intended to confer on the First and Fourth Divisions of the Adjustment Board. We further submit that the "definition" given the term "yard-service employees" by the trial court is utterly at variance with the conclusively established use of the term in the rail industry as inclusive of yardmasters; and whether it be "definition," historical background, adminis-

trative interpretation, or statutory scheme and design, every available guide points to Congressional intent to delegate jurisdiction over yardmaster disputes to the First Division of the Adjustment Board.

I.

The term "yard-service employees" has long been used in the trade to designate numerous crafts and classes of rail employees engaged in yard-service (as distinguished from road service), including the class and craft of yardmasters.

The trial court entered findings of fact 7 to 13, inclusive, relative to trade usage of the term "yard-service employees" (R. 232-233). The findings are a mixture of fact and conclusion and only in findings 11 and 13 does the court assign a meaning to the term. In finding No. 11, the court stated that "yard-service employees" referred "*solely* to railroad employees engaged in making and breaking up trains and switching cars within yard limits" which clearly includes yardmasters except for the designation of crafts intended to exclude them (R. 232). In finding No. 13 the court stated that "railroad usage, as evidenced by the testimony of experienced railroad officials and representatives of railroad employees, has *never* included yardmasters and assistant yardmasters within the meaning of the terms 'yard-service employees' or 'yardmen' * * * " (R. 233).

The "definition" adopted by the trial court is drawn from *conflicting oral testimony*. Three railroad executives testified for the respondents (R. 190, 195, 196). The witness Theodore L. Green stated that within *his own experience and knowledge* the term referred to certain employees who make and break up trains exclusive of yardmasters and he distinguished yard employees by the general distinction *between yard service and road service* (R. 213). The other two witnesses for the respondents merely concurred in Green's testimony (R. 196, 197). For the peti-

tioners in rebuttal, F. H. Nemitz testified that he had been engaged in railroad or brotherhood work for a number of years over the entire United States and that within his experience and knowledge the term "yard-service employees" was used as inclusive of yardmasters (R. 211-212, 213-215, 217). There was, therefore, a conflict in the oral evidence as to the witnesses' understanding of the meaning of the term. The lower courts, we submit, overlooked this conflict in the testimony and erroneously emphasized lack of conflict in support of their conclusions. For the convenience of the court, we have set forth in an appendix hereto the relevant oral evidence relating to this issue.[1]

The Circuit Court, in reviewing the decision of the trial court, approached the problem before it not as one of establishing the intent of Congress from all available sources but rather one of determining whether there was *some* evidence to support the trial court's findings *irrespective of whatever evidence there was to the contrary.* Weight was given to the findings as though credibility of witnesses was a decisive factor. And the Circuit Court held that the proper interpretation of the Act followed *as a legal conclusion* from findings of fact as to a purported trade use of the statutory term involved. Documentary references establishing conclusively the use of the term involved were ignored. Further, the oral evidence does not support the sweeping assertions of the findings as to railroad usage, and the evidence as a whole, oral and documentary, overwhelmingly refutes any generally restricted use of the term.

It is submitted that the approach used by the Circuit Court is directly contrary to the decisions of this court in

[1] Aside from the oral testimony, the respondent pointed to several submissions to the Adjustment Board with the claim that some general chairman for one or the other of the brotherhoods had used language in the submission that appeared by inference to distinguish yardmasters from yard service employees. It will be noted that the instances cited were so inconclusive that neither the District Court nor the Circuit Court referred to them in support of the findings. (See for instance R. 200, Respondents Exhibits 3, 3-A, 1-B, 1-E, 1-F, 3-B.)

respect to recognized principles of statutory interpretation and the weight to be accorded the findings of the trial court in these circumstances. *MacEvoy vs. United States, 322 U. S. 102; Great Northern Railway Co. vs. United States, 315 U. S. 262; Federal Trade Commission vs. Bunte Bros., Inc., 312 U. S. 349; United States vs. Cooper Corp., 312 U. S. 600; Norwegian Nitrogen Products Co. vs. United States, 288 U. S. 294; District of Columbia vs. Pace, 320 U. S. 698.* Further, this approach led the court to assign a meaning to the statutory term that is dependent solely on the personal understanding of three witnesses *contrary to conclusive documentary proof of the meaning of the term in the railroad industry.*

The term "yard-service employees" is but one of several designations used to segregate rail employees by crafts or classes according to the type of work engaged in. Rail employees are generally designated either as "operating employees" or as "non-operating employees." Employees engaged in the movement of freight and passenger trains are usually designated as "operating employees." Those engaged in maintenance work, communication services, ticket sales and other duties incident to, but not directly connected with, the movement of trains, are designated as "non-operating employees." Operating employees are also further sub-divided as between "road-service employees," who work between terminals, and "yard-service employees," who work within yard limits[2] (R. 191, 211).

[2] The terminology referred to is clearly illustrated by the following excerpt from the *Report to the President by the Emergency Board appointed May 31, 1943*, pursuant to the Railway Labor Act. This report, on file with Library of Congress, Washington, D. C., at p. 11 reads as follows:

"The railroad workers involved in this dispute are train and engine and *yard service employees* who, for the most part, are engaged in the actual movement of freight and passenger trains. They are frequently referred to as 'transportation employees or '*operating employees*,' in contrast to the '*non-operating employees*' who maintain railroad tracks and equipment, handle freight shipments and sell passenger tickets, and perform a multitude of other duties necessary in the transportation of freight and passengers by rail.

"Out of a total of approximately 1,350,000 workers on the payrolls of class I carriers in May 1943, about 315,000 were operating employees whose proposals for a general wage increase are before this Board.

"Most *operating employees* are engaged in '*road service*,' that is, in the

Ordinarily crafts or classes of rail employees are grouped together in relation to the designation above noted. For instance, the First Division of the Adjustment Board has jurisdiction over the disputes of well known crafts of "operating employees." The Second and Third Division of the Adjustment Board, in the main, have jurisdiction over the disputes of "nonoperating employees." The Fourth Division has jurisdiction over disputes of employees of marine carriers and a "catch-all" jurisdiction of isolated rail employees few in number and not generally organized along craft lines at the time of the enactment of the Railway Labor Act such as patrolman, stock claim agents and others.

For many years yardmasters, whose duties are primarily concerned with supervision of train and switching movements within the yard (R. 162-168, 193, 75-88), and who are ordinarily promoted from, or demoted to, the yard train and engine crafts (R. 203, 212), have been grouped and referred to as operating employees in yard service.[8] Agencies intimately associated with the railroad industry

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performance of various duties required for the movement of freight and passenger trains from one locality to another. A substantial number of railroad workers, however, are employed in '*yard service.*' The duties of this group include the making up and the breaking up of trains in connection with the preparation for, or the culmination of, terminal to terminal runs. These employees, furthermore, handle the switching of cars for industries within terminal or yard limits, which involves the placing of loaded or empty cars on the tracks or sidings of factories and industrial concerns and the picking up of unloaded or loaded cars from these tracks, and they also interchange cars between connecting carriers.

"There are thus two types of work performed by this large group of employees — *road service*, which in turn is divided into freight and passenger service, *and yard service*. The largest number of employees are engaged in road freight service. In May 1943 slightly more than 141,000 or 45 percent of the approximately 315,000 railroad transportation employees were engaged in such service. Nearly 44,000 employees or about 13 percent of the total were in passenger service, and approximately 130,000 or 42 percent were *employees in yard service*, including switch tenders, hostlers, *and yardmasters.*" (Emphasis supplied.)

[8] In the lower courts the respondents relied heavily on the fact that in addition to supervision of the various operating yard crafts, the yardmaster also has charge of clerical workers and other nonoperating employees not ordinarily classed as yard service employees (R. 162, 213). The record is clear, however, that yardmasters are mainly concerned with train and switching movement within the yard and have always been known as operating employees "in yard service."

over long years have repeatedly recognized this established and accepted practice and usage. The Interstate Commerce Commission, the National Railroad Adjustment Board, the National Mediation Board, the 1943 Emergency Board, the Railroad Retirement Board, the Train Service Board of Adjustment for the Western Region, and the Director-General of Railroads in World War I have specifically grouped and referred to yardmasters as employed in "yard-service" or as operating employees. All of these references were made in official documents, some of which were in the form of reports to Congress and are, of course, drawn from an extensive knowledge of the rail industry and its terminology. The uniformity of terminology by these various agencies as used in the following references illustrate beyond controversy the use of the term "yard-service employees" as inclusive of yardmasters:

1. The Emergency Board appointed May 31, 1943, by the President of the United States, pursuant to the Railway Labor Act, in its report[4] dated September 25, 1943, stated:

> "There are thus two types of work performed by this large group of (operating) employees — road service, which in turn is divided into freight and passenger service, and yard service * * *. Nearly 44,000 employees, or about 13% of the total, were in passenger service, and approximately 130,000, or 42%, were employees *in yard service, including switch tenders, hostlers, and yardmasters.*[5]

2. The Interstate Commerce Commission in its report[6] *to the House of Representatives* of the United States, dated December 13, 1932 (over a year and a half prior to the 1934 amendments to the Railway Labor Act), on the effect of a six-hour day in the employment of all classes of railroad employees, under the heading "Groups of Employees," listed:

[4] Library of Congress, Washington, D. C.
[5] Emphasis is supplied in the petition and brief unless otherwise noted.
[6] Library of Congress, Washington, D. C.

"I. Executives, Officials and Staff Assistants.
II. Professional, Clerical and General.
III. Maintenance of Way and Structures.
IV. Maintenance of Equipment and Stores.
V. Transportation (*Other Than* Train, Engine, and *Yard*).
VI(a) Transportation, (*Yardmasters*, Switch Tenders and Hostlers).
(b) Transportation (Train and Engine Service)."

3. In the First, Second and Third Annual Reports of the National Mediation Board to Congress[7] covering the period from June 30, 1934, to June 30, 1937, the National Mediation Board compiled information concerning the agreements of yardmasters and those of other employees in yard work under the heading "Yard Service Employees."

Also the First Annual Report of the National Mediation Board for the fiscal year ended June 30, 1935, in Table VII, p. 35, listed the number of carriers having agreements with "yard-service employees" and made reference to the fact that the number of agreements with system associations "includes twenty separate agreements with *yardmasters* in addition to the agreement held by the National Labor Organization for *the other yard service employees.*"[8]

4. The Railroad Retirement Board in its Operating Manual for Field Offices,* Section 603, lists the crafts represented by the various rail brotherhoods and includes therein the following reference:

"Brotherhood of Railroad Trainmen * * * *in yard service . . . yardmasters, assistant yardmasters,* yard conductors, foremen, flagmen, switch tenders * * *"

[7] Library of Congress, Washington, D. C.

[8] The same classification appears in Table IX at p. 28 of the Second Annual Report of the National Mediation Board for the fiscal year ended June 30, 1936. Likewise, in Table VIII of the First Annual Report, Table X of the Second Annual Report and Table X of the Third Annual Report, the Board, under the heading "Yard Service Employees" listed wage and rail agreements between Class I carriers and rail employee representatives, *including those of the Railroad Yardmasters of America, intervenor herein, who represents yardmasters exclusively.* (In subsequent Annual Reports the rail crafts, including yardmasters, were designated by crafts rather than grouped by general designations.)

* Library of Congress, Washington, D. C.

5. The Train Service Board of Adjustment for the Western Region, in Decision No. 2948, dated February 21, 1929 (R. 209, Exhibit J.), set forth a joint statement of the facts of the dispute as submitted *by the carrier* and the Order of Railway Conductors, as follows:

> "Joint Statement of Facts: *Prior to 1920* and subsequent thereto, E. J. McMartin, J. E. Elliott, and H. T. Ireland were employed in the Chicago freight terminal *as yardmasters.* On or about January 1, 1927, they were permitted to give up these positions and displace conductors from positions in the Chicago switching district on the basis of their employment *for yard service prior to 1920.*".

6. The Director-General of Railroads in General Order No. 27 with its supplements, addenda, amendments and interpretations issued by the Director-General of Railroads, on April 23, 1919,* stated:

> "Effective January 1, 1919, where there is no existing agreement or practice more favorable to employees, the wages of yard foremen *who also act as yardmasters* (*designated in some schedules as 'foot-board' yardmasters*) will be not less than 40 cents per day in excess of the yard foreman's rates. The same rules for the basic day and overtime shall apply to such employees as applies to *other yardmen.*"

7. The National Railroad Adjustment Board in its Official Index Digest to the Awards of the First Division† published in three volumes on July 1, 1939, March 1, 1941, and March 1, 1943, under the heading "Yard Service" lists as a sub-heading "Yardmasters." In the "General Index," of these volumes, the Awards involving yardmasters are digested under the heading "Yardmasters" which appears as a sub heading under the general heading "Yard Service." The same index outline was followed by the Train

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* General Order No. 27, together with its supplements and interpretations, is on file among the United States Railroad Administration records in the National Archives, Washington, D. C.

† Library of Congress, Washington, D. C.

Service Board of Adjustment for the Western Region for its Index of Decisions published March, 1928 and May 1, 1931.

We submit that it is inconceivable that over many years there should be this uniformity of terminology by the separate agencies most intimately familiar with the rail industry unless in general usage the term "yard-service employees" as inclusive of all operating yard crafts including yardmasters had become established in the industry. The statistical reports of these agencies are made up *directly from reports by the rail carriers.*

II.

Yardmasters have been aligned with the other train and yard service crafts for the submission of their disputes to the same Board of Adjustment for nearly a quarter of a century.

The Circuit Court expressed the opinion that "the historical alignment of yardmasters with the train and yard service crafts in the settlement of disputes is not helpful in determining the question now before us." We submit that this historical alignment of yardmasters with the other train and yard service crafts had significance in construing Section 3; First (h) of the Railway Labor Act. The 1934 Amendments to the Act creating the Adjustment Board did not substantially change the historical alignment of rail crafts for the submission of their disputes. Under the 1934 Amendments employees represented by the five operating rail brotherhoods submit their disputes to the First Division; disputes of the shop crafts or non-operating employees are submitted to the Second Division; and disputes of telegraphers, clerical employees, sleeping car conductors, porters and other crafts, go to the Third Division.

This alignment of crafts is substantially identical to the craft alignment for the submission of disputes under

boards of adjustment created by the Director-General of Railroads in 1918, under the Transportation Act of 1920, and under the Railway Labor Act of 1926.[10]

The Circuit Court, we believe, gave a disproportionate emphasis to the fact that some yardmasters, either because of representation by the Switchmen's Union or because of no union representation, did not submit their disputes to the same Board as did the other train and yard service crafts. All that is significant here is that the 1934 Amendments corrected this defect in the former Boards by making jurisdiction of all Divisions dependent on craft employment rather than upon membership in the union representing the particular craft, but these changes were certainly not so material as to destroy the similarity of craft alignment before the present Adjustment Board as before the earlier Boards, nor did they mark a new era in Adjustment Board procedure, such as would negative any reliance whatever on a historical approach in the interpretation of the 1934 amendments.[11]

III.

The contemporaneous administrative interpretation of the Adjustment Board is significant.

The trial court found that prior to August, 1941, the

[10] A review of the historical background of the Adjustment Board is set out in the *Inquiry of the Attorney General on Administrative Procedure Relating to the National Railroad Adjustment Board (Book I), Historical Background and Growth of Machinery Set Up for the Handling of Railroad Labor Disputes, 1888-1940, (Book II).*

[11] The First Annual Report of the National Railroad Adjustment Board, set forth as Appendix A of the First Annual Report of the National Mediation Board for the fiscal year ended June 30, 1935, contains at p. 46 the following statement:

"The First Division of the National Railroad Adjustment Board *took over the work of the four regional Boards*, adding thereto representation of many railroads not parties to any of the regional Boards, and adding also, the Switchmen's Union of North America as a party *to the First Division*. The abolition of these four regional Boards left, pending and unadjusted approximately 1,200 cases for the First Division, which cases had to be revamped to conform reasonably with the requirements of this Division, and submitted to it."

First Division of the Adjustment Board heard disputes "involving yardmasters" and rendered awards in such disputes (R. 230). The Circuit Court was of the opinion that only *three* of the nineteen decisions[12] of the First Division of the Adjustment Board offered in evidence involved yardmasters "in the proper sense of that term." The respondents, in their brief on appeal to the Circuit Court, conceded that at least *five* of these submissions involved yardmasters but attempted to distinguish the other submissions as involving at most only the yardmaster's position. Among the submissions conceded by the respondents to involve a yardmaster was Award 1649 involving the claim of one E. J. McMartin protesting his *demotion* from yardmaster to engine foreman (R. 210). However, the respondents argued that Award 1274 involving claims of certain yardmen protesting a failure of *promotion* to yardmasters under the rules of a collective contract did not involve a yardmaster dispute (R. 210). These cases are typical of the distinction sought to be made. As a result, a yard employee protesting *demotion* from yardmaster to the position of engine foreman, for instance, will, under the Circuit Court decision, present his case to the Fourth Division while a yard employee, for instance an engine foreman, protesting a failure to observe a *promotion* rule entitling him to a yardmaster position will present his case to the First Division. In view of the interlocking seniority rights of many of the rail crafts, including those of yardmasters with the other train and engine yard crafts, it is submitted that hairline distinctions of this kind will completely disorganize the work of the Adjustment Board and eventually destroy it as a practical administrative forum for the settlement of rail disputes.

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[12] These nineteen decisions are only a few of the many decisions listed in the General Index Digest of the Awards of the First Division indexed under the sub-heading "yardmasters" which appears under the general heading "Yard Service."

Prior to 1941 the First Division of the Adjustment Board, composed of ten rail experts, had in numerous submissions heard and determined yardmaster cases and recited in each of the awards the statement: "This Division of the Adjustment Board has jurisdiction over the dispute involved herein." Surely there is not, as indicated by the Circuit Court, any presumption that the First Division had failed to consider the question of its jurisdiction over these disputes merely because of lack of discussion of this issue in the award.

IV.

The aim and policy of the Railway Labor Act is apparent from its terms and provisions.

We submit that the general scheme and design of the Railway Labor Act and particularly the provisions of Section 3, First (h) should have impelled the conclusion that jurisdiction over yardmaster disputes lay in the First Division. It does not seem an unreasonable observation to say that a contrary conclusion results in an absurdity. Obviously Congress intended the first three divisions of the Adjustment Board to hear the disputes of employees of *rail carriers* and the Fourth Division to hear the disputes of employees of *water carriers*. The Board was divided into divisions for the very purpose of achieving an administrative forum composed of men informed by long training and experience in the technical problems of the particular craft disputes to be submitted to them. It requires a most violent assumption as to Congressional purpose, unsupported by convincing proof, and contrary to every available guide to congressional purpose, to reach the conclusion that Congress intended that a well organized rail craft submit their disputes to a board representative of carriers by water and employees engaged in maritime transportation.

V.

Congress has refused to amend the Railway Labor Act to exclude yardmasters' disputes from the jurisdiction of the First Division.

Congress has twice refused to amend the Railway Labor Act so as to except yardmasters' disputes from the jurisdiction of the First Division. At the request of the American Short Line Railroad Association, bills were introduced in 1940 and 1941 in both the 76th and 77th Congress which contained the following provision:

> "The First Division of the Adjustment Board shall have jurisdiction over disputes involving train-and-yard-service employees of carriers, including engineers, firemen, hostlers, outside hostler helpers, conductors, trainmen and yard service employees, *except yardmasters and other subordinate officers.*"

In both sessions of Congress, the Senate Committee on Interstate Commerce rejected these proposed amendments to the Railway Labor Act (R. 169-170).

CONCLUSION

Without undertaking at this time to present an adequate argument on the merits, we submit that the petition for writ of certiorari should be granted in order that this court may review the decision of the United States Circuit Court of Appeals for the Seventh Circuit in this case.

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APPENDIX

Excerpts from Act of May 20, 1926, as amended by Act of June 21, 1934, 45 U. S. C., Sec. 151, et seq.

Section 3, First (h) of the Railway Labor Act provides as follows:

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and

third divisions. This division shall consist of six members, three of whom shall be selected by the carriers, and three by the national labor organizations of the employees."

Excerpts from the testimony of Theodore L. Green, Edmund G. Kiesele, Morris E. Somerlott and F. H. Nemitz.

THEODORE L. GREEN on direct examination testified as follows (R. 191):

"Q. During that period, will you state whether or not the term 'yard service employees' has had a certain meaning in the railroad field? I am not asking you to state what the meaning is; I am asking you if it has had a certain definite meaning?

"A. It refers to certain employees who make up and break up trains in yards within defined limits.

"They also do other switching of cars, placing and pulling of cars at industries within those yards; namely, engineers, firemen, conductors or engine foremen, yard brakemen, switchmen or helpers, as they are termed.

"Q. Now, has it had that general meaning throughout the period of your experience and to your knowledge?

"A. Yes, sir.

"Q. Does the term as you have defined it include yardmasters?

"A. No, sir.

"Q. Can you tell the court what the history of that term is, or explain to the court how it came to have that meaning that you have ascribed to it?

"A. Well, for many years, or for as long as I can remember, employees in yard service who had the making up and breaking up of trains and the other switching as referred to before have always had a different rate of pay than employees engaged in a similar service and working with, outside those definite yard limits, or yards.

"Q. You say for many years, or as far back as you can remember, that embraces a period prior to 1934-1935, does it?

"A. Yes, sir.

"Q. For many years prior?

"A. Yes, sir.

"Q. Is there any term, or are there any terms in the railroad field that are equivalent to, or have the same meaning as the term 'yard service employees'?

"A. Yard crews, or yard men.

"Q. You mean by that answer that —

"A. They would call them yard crews or yard men —

"Q. That the term 'yard crews' and 'yard men' are the equivalent of the term 'yard service employees,' is that what you mean?

"A. Yes, sir."

Mr. Smith: "I think that is all."

On cross examination Mr. Green stated (R. 193):

Mr. Hassenauer: "Q. As a matter of fact, wouldn't you say that the work of a yardmaster is more closely allied to that of the man engaged in train and engine service than it is with any other group or lass of employees in the yard?

"A. Yes, sir."

EDMUND G. KIESELE and MORRIS E. SOMERLOTT merely concurred in the foregoing testimony by Theodore L. Green (R. 196, 197).

On direct examination, MR. F. H. NEMITZ testified as follows (R. 211-213):

"Q. Mr. Nemitz, I will ask you whether or not as a result of your experience, both as an active worker for railroads, and as a result of our experience in the last twenty-five years in the various capacities which you have described, whether or not the yard service employees among railroad men has any particular or well defined meaning or understanding?

"A. They have, yes. Usually they are considered men who work within the switching limits, or certain defined

limits, generally referred to as switchmen, or yard limits. They perform a service such as placing cars at different industries, supplying cars of different kinds at different places within those switching or yard limits, and making up and breaking up trains, that is, they break up the incoming trains and they make up the outgoing trains, fixing them in their regular order for the handling by road crews, who will take them from one terminal to some other terminal, or some other point outside of the yard limits or switching limits.

"Q. What would you say as to whether or not the class or craft of yardmasters is generally understood to be included within the term or expression of 'yard service employees'?

"A. I would say that they fit more nearly in with the yard service employees than with any other class. They don't belong in the road service. They have no rights there. They don't belong in the clerical department. They have no rights there. Usually the yardmasters hold rights as yard foremen, or as yard helpers in some yard on the railroad, where they hold rights as yardmasters, and where they perform services as yardmasters.

"Q. Do I understand you to mean by that, Mr. Nemitz, that yardmasters are usually promoted from yard employees?

"A. Quite generally, yes, sir.

"Q. And in the order of demotion in the event of lack of business, do these men who are promoted to yardmasters usually retain their seniority as a yard conductor, or yard foreman, or switch tender, or whatever craft it was they held seniority in?

"A. Yes."

On cross examination, Mr. Nemitz stated:

"Q. You concede that. Let me ask you this, first: Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance

'yard service employees' and 'yardmen' and 'yard crews' generally speaking mean the same thing?

"A. Yes, sir.

"Q. Now, you said you thought of yardmen, and that you understood the term to cover people that worked within the yard, or within the switching limits, as I understood your statement?

"A. That is right, such as making up and breaking up of trains, switching, and so on.

"Q. In other words, I think you somewhat qualified that, didn't you? In other words, you are not telling the court that you think, for example, that these clerical people that work in the yards, or car checkers, the weighmasters, or clerks, you don't think of those as yardmen, do you?

"A. No, sir.

"Q. So that the terms 'yard service employees,' and the equivalent terms, 'yardmen' and 'yard crews,' they don't include all of the men that work within the yard, or within the switching limits, do they?

"A. They would not include such as the storekeepers, or the section men, or perhaps other brakemen, or clerks, and so on. Yardmen are usually men who have to do with the making up and breaking up of trains, switching in the yard, and supervising the work of the yardmen, *which would include, in my opinion, yardmasters and assistant yardmasters.*

"Q. *Where you differ from the witnesses who testified this morning, I take it, is right at this point, that they say that the men who supervise that work that you have just referred to are not within the meaning of the terms, whereas, you include the men who do the work, and also the men who supervise it; that is the difference between* —

"A. *I do.* I might say, for this reason: I base it upon these facts, that every tribunal that has decided a dispute for men engaged in yard service, such as yard engineers, firemen, hostlers, hostler helpers, road conductors, train-

men and yardmen, have also decided cases for yardmasters and assistant yardmasters. Division 1, set up under, by agreement, in 1918, the very first board in existence did that. The Western Train Service Board, upon which I served did that, as evidenced by Board decisions submitted here as an exhibit. The Southwestern Train Service Board, where I served, also did so. The Eastern, the Southeastern Board did likewise, and the present Board did likewise, as evidenced by these exhibits, and in addition to that, they make this statement, that this Board, the first division, National Railroad Adjustment Board, has jurisdiction in the dispute, in the dispute of those cases of yardmasters, and decided that there was no question about it, as I understand it, until approximately 1938, when, I believe, Judge Holly handled some sort of case."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 63

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. Fraser, *et al.*, *Petitioners,*

vs.

O. E. SWAN, *et al.*, *Respondents.*

No. 64

F. J. WILLIAMS, *et al.*, *Petitioners,*

vs.

O. E. SWAN, *et al.*, *Respondents.*

BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 63 and 64

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, President and F. H. NEMITZ, Senior Vice-President; and BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, President and S. R. HARVEY, Assistant President, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents.* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, and FRED LEWIS, Individually, and as Members of the National Railroad Adjustment Board, *Petitioners.*

v.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. MCDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, *Respondents,* RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, *Intervenor-Respondents.*

BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the District Court appears at Record 222-227. The opinion of the Circuit Court is reported in 152 F. 2d. 325 and appears at Record 271-279.

JURISDICTION

The judgment of the Circuit Court was entered December 21, 1945. Petition for certiorari was filed on March 18, 1946, and was granted on April 22, 1946. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended.

STATUTE INVOLVED

The Railway Labor Act as amended (45 U. S. C. A. Sec. 151, et seq.), the pertinent provisions of which are set forth in the appendix, *infra*.

STATEMENT

The National Railroad Adjustment Board was created by the amendments to the Railway Labor Act of June 21, 1934. Section 3, First (h) of the Act provides in part as follows:

> "(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:
>
> "First Division: To have jurisdiction over disputes involving *train-and yard-service* employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and *yard-service* employees.[1]

The question presented involves the interpretation of the Railway Labor Act, that is, whether the First Division of the National Railroad Adjustment Board has jurisdiction over disputes involving railroad yardmasters. Petitioners contend that Congress used the term "yard-service employees" in Section 3, First (h) of the Act as inclusive of yardmasters as well as other crafts in yard service, and that

[1] Emphasis is supplied in this brief unless otherwise noted.

the First Division has jurisdiction over yardmaster disputes.

The Act provides that the Second Division shall have jurisdiction over disputes involving certain classes of rail employees usually designated as the shop craft employees. The Third Division is given jurisdiction over disputes involving station, tower and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station and store employees, signalmen, sleeping car conductors, sleeping car porters and maids, and dining car employees.[2]

The jurisdiction of the Fourth Division is as follows:

> "Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property *by water*, and all other employees of carriers over which jurisdiction *is not given* to the First, Second, and Third Divisions."

Respondents contend and the Circuit Court of Appeals for the Seventh Circuit affirmed a judgment of the District Court holding that railroad yardmasters are not "yard-service employees" and that the Fourth Division has exclusive jurisdiction over such disputes under the "catch-all" provision, "all other employees of carriers over which jurisdiction is not given to the First, Second and Third Divisions."

The First, Second and Third Divisions of the Adjustment Board are composed of five representatives of *rail* carriers and five representatives of national labor organizations representing *rail* employees. The Fourth Division is composed of three representatives of carriers directly or indirectly engaged in transportation *by water* and three representatives of national labor organizations represent-

[2] No claim has been made either by petitioners or by respondents that the Second or Third Division of the Adjustment Board has jurisdiction of disputes involving yardmasters.

ing *marine* employees. The railway and marine labor organizations represented on the First and Fourth Divisions of the Adjustment Board are set forth in Appendix II of this brief.

Prior to August 28, 1941, the First Division of the National Railroad Adjustment Board assumed jurisdiction, pursuant to the provisions of Section 3, First (h) of the Railway Labor Act, of disputes involving railroad yardmasters, and rendered awards in such disputes. (R. 230, 210 Plaintiffs' Exhibit K.)

On March 21, 1938, the Railroad Yardmasters of America, intervenor herein, filed the disputes of three individual yardmasters with the Fourth Division of the Adjustment Board (R. 231). The carrier and labor members of the Fourth Division deadlocked on the question of the jurisdiction of that division to hear these cases (R. 231, 174-175). Thereupon, the Railroad Yardmasters of America brought action in the United States District Court for the Northern District of Illinois, Eastern Division (Chancery No. 16031), against the members of the Fourth Division for a writ of mandamus commanding the Fourth Division to docket and hear the three submissions (R. 231, 158, 171-175). The carrier members of the Fourth Division filed answer admitting the allegations of the petition (R. 175-176). No answer was filed by the labor members of the Fourth Division (R. 177).

On July 11, 1938, the United States District Court for the Northern District of Illinois, Eastern Division, Honorable William H. Holly presiding, upon the admissions of the carrier members and the *default* of the labor members representative of maritime unions, entered its decree, known in this record as Chancery No. 16031, holding that the Fourth Division had *exclusive* jurisdiction of yardmaster disputes and ordering that division to hear the three disputes submitted to it (R. 231, 177, 181). The Railroad Yardmasters of America plead the decree in Chancery No. 16031 as a final and binding adjudication of the issues raised by

the petitioners in this cause (R. 115). The District Court, Honorable William H. Holly again presiding, held the decree in Chancery No. 16031 not to be res judicata, stating in its memorandum opinion that the decree had been induced *"by collusion of the parties and without any consideration of the issues involved"* (R. 224).

Pursuant to the order of Chancery No. 16031, the Fourth Division assumed jurisdiction of disputes involving yardmasters submitted to it and heard and rendered awards in such disputes *subsequent to July 11, 1938* (R. 231). The First Division, however, *continued* to assert jurisdiction over yardmaster disputes until August, 1941 (R. 230, 231).

On August 28, 1941, the five carrier members of the First Division of the Adjustment Board informed the five labor members of that division that in view of the decree in Chancery No. 16031 of July 11, 1938, directed to the Fourth Division, the carrier members of the First Division would not agree to set yardmaster cases docketed with it for hearing or participate in decisions on the merits. (R. 186-188, 231) The letter of the carrier members proposed that these dockets and similar disputes and submissions arising in the future involving yardmasters be docketed with the Fourth Division "since it appears that by the terms of the amended Railway Labor Act, *as construed by the District Court of the Northern District of Illinois, Eastern Division*, jurisdiction over the subject matter of each of the aforecited dockets is vested in the Fourth Division" (R. 186-188). It will be noted that the carrier members did not assert that yardmasters were not in yard service or were not "yard-service employees" within their own understanding of that term, but based their decision entirely upon the collusive decree in Chancery No. 16031 (R. 186-188).

Since August 28, 1941, the carrier members and the labor members of the First Division have been deadlocked on the question of the jurisdiction of that division over disputes involving yardmasters. As a result yardmaster disputes

docketed with the First Division by the petitioners remain unconsidered and unadjusted (R. 231).

Following the deadlock of the First Division on and after August 28, 1941, petitioners on January 12, 1942, filed their petition in this cause in the District Court for the Eastern District of Illinois for a declaratory judgment that the First Division of the National Railroad Adjustment Board has exclusive jurisdiction of disputes involving yardmasters within the terms and definitions of the Railway Labor Act, and particularly Section 3, First (h) thereof (R. 2-88, 145-146). The members of the First and Fourth Divisions of the Adjustment Board were made parties defendant (R. 2, 144),[3] The District Court permitted the Railroad Yardmasters of America, a labor organization representing only yardmasters with the exception of a few stationmasters, the Great Northern Railway Company, and the Southern Pacific Company to intervene as parties defendant (R. 108, 131-132).[4]

It is without controversy that yardmasters are "employees" subject to the Railway Labor Act within the definition contained in Section 1, Fifth, of the Act, and the orders of the Interstate Commerce Commission.[5] It is also without controversy that yardmasters work in a railroad yard (R. 162). The issue presented is whether Congress intended to use the term "yard-service employees" as inclusive of yardmasters as well as other yard crafts whose work is directly connected with yard operation and the switching of trains and cars in railroad yards, and grant jurisdiction

[3] The answer of the labor members of the First Division appears at Record 88-92. The answer and counterclaim of the carrier members of the First Division appears at Record 93-104, 147-148. The answer of the carrier members of the Fourth Division appears at Record 151. The petitioners' reply to answer and counterclaim of the carrier members appears at Record 154-155.

[4] The answer and counterclaim of the Railroad Yardmasters of America appears at Record 109-124; the answer of the Great Northern Railway Company appears at Record 126-131, 142; the answer of the Southern Pacific Company appears at record 135-144, 150. The petitioners' reply to the counterclaim of the Railroad Yardmasters of America appears at Record 152; the counter-petitioners' reply to the answer and counterclaim of the carrier members of the First Division appears at Record 154-155.

[5] See Interstate Commerce Commission order, Ex. Parte 72 (R. 201, Intervenors Exhibit No. 5).

of such disputes to the First Division, or whether Congress intended to use the term "yard-service employees," as including only engineers, firemen, hostlers and outside hostler helpers, conductors, and trainmen in road or yard service, and grant exclusive jurisdiction of disputes involving yardmasters and other yard crafts to the Fourth Division, composed of maritime representatives.

A railroad yard is a system of tracks within defined limits, over which the movement of engines and cars not authorized by time table or train order may be made, subject to prescribed signals and rules or special instructions. A yard engine is an engine assigned to yard service and working within yard limits (R. 162).

The yardmaster has charge of the movement of trains and engines in a railroad yard (R. 162-169, 75-88). All trains and engines, and all employees performing yard work within yards are subject to his direction and control (R. 162-169). The yardmaster's principal duty is the supervision of such yard crafts or engineers, firemen, conductors, brakemen, flagmen, switchtenders, hostlers, yard helpers and others in the work of making up and breaking up, and switching trains within the yard. In short, the yardmaster is in charge of yard switching work.

The following excerpt from the Consolidated Code of Transportation Rules and General Instructions issued by the Great Northern Railway Company illustrates the yardmaster's duties (R. 167-168):

"970. Yardmasters report directly to Agents and obey instructions of Superintendent, Assistant Superintendents, Trainmasters, and Chief Dispatchers.

"971. They have charge of yards, of the men employed, the handling of trains and the movement of cars therein.

"972. It is their duty to see that the trainmen, enginemen and engines are ready for duty at the appointed times; that trains are properly made up (See

Rule 872), inspected and ready to leave on time and that doors of cars are properly secured.

"973. They must see that cars are not unnecessarily delayed in yards; that they are inspected and those needing heavy repairs are promptly sent to the shop or placed on repair tracks.

"974. They must see that all tracks are switched promptly and regularly; that transfer tracks with foreign lines are worked at the agreed upon time; that deliveries to industry, team and private tracks are made without delay and that repair and shop tracks are switched daily at the appointed times.

"They must insist on air hose being parted by hand and never permit them to be pulled apart.

"975. They must not permit a train to start or a yard engine to move with an engineman, conductor, yard foreman, or a brakeman connected with it who is under the influence of liquor or unfit for duty. They must report such cases promptly to the Agent and Superintendent.

"976. They must be familiar with the rules governing men in train service and the duties of all employees connected with freight trains; they must require the efficient discharge of such duties while in their yards and report violations of the rules coming to their notice.

"977. They will be held responsible for the proper position of switches. Main line switches in yards must be set and locked for main track except when in actual use. Inside switches except those on passing tracks may be left as used."

The District Court, in holding that yardmasters are not yard service employees, relied solely on the oral testimony of three railroad executives who testified for the respondents to the effect that within their own experience and knowledge the term "yard-service employees" did not include yardmasters. The meager oral testimony relied on to support the findings and conclusions of the District Court

appears in the testimony of the witness Theodore L. Green, his testimony being concurred in by respondents' witnesses Edmund G. Kiesele and Morris E. Sommerlott (R. 196, 197). Mr. Green testified as follows (R. 190-191):

"Q. Did you say when you began your railroad employment?

"A. March, 1902.

"Q. You have been continuously employed in railroad service since that time?

"A. Yes, sir.

"Q. During that period, will you state whether or not the term 'yard service employees' has had a certain meaning in the railroad field? I am not asking you to state what the meaning is; I am asking you if it has had a certain definite meaning?

"A. It refers to certain employees who make up and break up trains in yards within defined limits.

They also do other switching of cars, placing and pulling of cars at industries within those yards; namely, engineers, firemen, conductors or engine foremen, yard brakemen, switchmen or helpers, as they are termed.

"Q. Now, has it had that general meaning throughout the period *of your experience* and to your knowledge?

"A. Yes, sir.

"Q. Does the term *as you have defined it* include yardmasters?

"A. No, sir."

The basis of the decision of the District Court is indicated in its memorandum opinion wherein the court said (R. 226):

"Three witnesses testified ~~that among~~ railroad operatives the term yard service employee did not include

yardmasters. The *one* witness who testified for plaintiffs did not deny this. All he said was that 'they fit more nearly in with the yard service employees than any other class.' That certainly is not a statement they are members of that class. It implies that they are not, that they are not in any class mentioned in the statute but are more nearly related to the class of yard service employees than any other class. Clearly as to the direct evidence introduced on this subject *the preponderance* is against the plaintiffs."

In stating that there was no denial of the testimony of the respondents' witnesses by the petitioners' witness the District Court overlooked parts of the testimony and clearly erred. Mr. F. H. Nemitz, Senior Vice-President of the Order of Railway Conductors, testifyed for the petitioners under cross examination (R. 212-213):

"Q. * * * Let me ask you this, first: Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance 'yard service employees' and 'yardmen' and 'yard crews' generally speaking mean the same thing?

"A. Yes, sir.

"Q. Now, you said you thought of yardmen, and that you understood the term to cover the people that worked within the yard, or within the switching limits, as I understood your statement?

"A. That is right, such as making up and breaking up of trains, switching, and so on.

"Q. In other words, I think you somewhat qualified that, didn't you? In other words, you are not telling the court that you think, for example, that these clerical people that work in the yards, or car checkers, the weightmasters, or clerks, you don't think of those as yardmen, do you?

"A. No, sir.

"Q. So that the terms 'yard service employees,' and

the equivalent terms, 'yardmen' and 'yard crews,' they don't include all of the men that work within the yard, or within the switching limits, do they?

"A. They would not include such as the storekeepers, or the section men, or perhaps other brakemen,* or clerks, and so on. Yardmen are usually men who have to do with the making up and breaking up of trains, switching in the yard, and supervising the work of the yardmen, *which would include, in my opinion, yardmasters and assistant yardmasters.*

"Q. Where you *differ* from the witnesses who testified this morning, I take it, is right at this point, that they say that the men who supervise that work that you have just referred to are not within the meaning of the terms, *whereas, you include the men who do the work, and also the men who supervise it; that is the difference between—*

"A. *I do.*"

The findings of the District Court are based *solely on the conflicting oral testimony.* Concluding that "the preponderance" of the oral evidence was against the petitioners, the District Court purported to find *an established and universal* "railroad usage" of the terms "yard service" and "yard-service employees" (R. 229-233). The court found that these terms described numerous crafts in yard work but that the yardmaster craft was not included among them. Specifically, the District Court found that the term "yard service employees" for many years has referred "*solely* to railroad employees engaged in making up and breaking up trains and switching trains within yard limits"; and that the term "yard service" denotes the work performed by such employees "who include engineers, firemen, conductors or engine foremen, yard brakemen or switchmen, and switchtenders." The crux of the findings of the District Court is contained in Finding No. 13 which reads (R. 233):

*This is evidently a misprint or error in transcription and should read "other trackmen."

> "*Railroad usage*, as evidenced *by the testimony* of experienced railroad officials and representatives of railroad employees, has *never* included yardmasters and assistant yardmasters within the meaning of the terms 'yard-service employees' or 'yard men', and yardmasters and assistant yardmasters have *never* been regarded as yard-service employees or yard men."

The memorandum opinion and the findings filed by the trial court disclose that its ultimate conclusions were predicated exclusively upon the oral testimony of respondents' witnesses, and that it did not give full consideration to the oral evidence, brushed aside the historic and legislative background of various voluntary boards of adjustment and their jurisdiction prior to the enactment of the amendments to the Railway Labor Act, the administrative construction of the Act by the Adjustment Board, documentary evidence of the meaning of the term "yard-service employees," attempts in Congress by the rail carriers to secure amendments expressly excluding yardmasters from the jurisdiction of the First Division, and ignored the intent of Congress as shown by the scheme and structure of the Act (R. 222-227, 229-234).

In accord with these findings and conclusions, the District Court entered judgment that the Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction to hear disputes involving yardmasters and assistant yardmasters employed by rail carriers; that the First Division of the Adjustment Board has no jurisdiction over such disputes (R. 234).

The Circuit Court of Appeals, in affirming the judgment of the District Court, likewise ignored and brushed aside the usual aids to congressional intent. It concluded that the oral testimony of the meaning of the term "yard-service employees" constituted "substantial evidence" in support of findings of Fact 7 through 13,[6] and that the definition

[6] The petitioners did not challenge Findings of Fact Nos. 1 through 6 on appeal to the Circuit Court (R. 244-246).

of the term involved a question of fact such as "bound" the Circuit Court. The Circuit Court then concluded that it followed *as a legal conclusion* that Congress intended to use the term "yard-service employees" in the sense that it was defined by the District Court under the preponderance of the evidence rule based on conflicting oral testimony (R. 271-279).

QUESTION PRESENTED

Does the First Division of the National Railroad Adjustment Board have jurisdiction over disputes involving railroad yardmasters within the meaning of Section 3, First (h) of the Railway Labor Act as amended.

SUMMARY OF ARGUMENT

The lower courts, on the basis of the oral testimony of three witnesses as to their opinion of the meaning of a term used in the Railway Labor Act, have assigned an interpretation to the Act:

1. Contrary to the historical fact that yardmasters have been aligned with the train and yard service crafts in the submission of their disputes to adjustment boards from the time of Federal control of the railroads in 1918 to the amendments to the Railway Labor Act in 1934, and the further fact that the First Division of the National Railroad Adjustment Board was patterned after the earlier voluntary boards of adjustment which heard such disputes and was designed by Congress to take over the work of these boards.

2. Contrary to the fact that the First Division of the National Railroad Adjustment Board took over the work of the regional boards which heard the disputes of train and yard service employees, including yardmasters, prior to 1934, and that the First Division of the Adjustment Board, composed of both carrier and labor members, heard disputes involving yardmasters until August 1, 1941, these

disputes being submitted to the First Division by both national rail employee organizations and the rail carriers.

3. Contrary to conclusive documentary evidence that experts in the rail industry have ordinarily used the terms "yard service" and "yard-service employees" to designate all yard crafts engaged in yard work, including the yardmaster craft, and that the term "yard-service employees" is commonly understood to include yardmasters both within and without the rail industry.

4. Contrary to documentary evidence that Congress in 1940 and again in 1941 refused to amend the Railway Labor Act so as to exclude yardmaster disputes from the jurisdiction of the First Division.

5. Contrary to the design and purpose of the Act to establish an Adjustment Board divided into four independent divisions, each division as nearly as possible being given jurisdiction over disputes involving employees in related lines of work.

The lower courts, petitioners respectfully submit, followed an erroneous and unprecedented course in arriving at the interpretation of the jurisdiction which Congress intended to confer in the several divisions of the Adjustment Board. Conflicting evidence or a "preponderance" of the evidence does not permit a finding of a universal and established trade use of a term, and particularly is this true when such a finding is based on the opinion testimony of three interested witnesses whose testimony is disputed, and is directly contrary to conclusive documentary evidence of the common understanding of the term within and without the industry. Findings of such universal and established usage are not supported by combing the record for some evidence on which they might be based, ignoring all other evidence to the contrary. Nor does the intent of Congress follow as a legal conclusion from a "definition" based solely on the findings of a purported "trade usage" drawn from conflicting oral testimony, and contrary to Congressional

intent as shown by other conclusive guides to Congressional intent.

Statutory construction requires that consideration and weight be given to every guide to congressional intent. As stated by this court in *United States vs. Dickerson*, 310 U. S. 554:

> "The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

Petitioners respectfully submit that the so-called definition given the term "yard-service employees" is utterly at variance with the established and commonly understood use of the term within and without the rail industry, and whether it be historical background, administrative interpretation, "definition," Congressional refusal to amend the Railway Labor Act to exclude yardmaster disputes from the jurisdiction of the First Division, or statutory scheme and design, every available guide to Congressional intent points to the purpose of Congress to confer jurisdiction of disputes involving railroad yardmasters in the First Division of the Adjustment Board.

I

HISTORICAL BACKGROUND OF THE NATIONAL RAILROAD ADJUSTMENT BOARD

In establishing the National Railroad Adjustment Board by the 1934 amendments to the Railway Labor Act, Congress did not create a new administrative procedure for the settlement of railway labor disputes. As has been stated, "The National Railroad Adjustment Board, created by the Railway Labor Act of 1926 as amended on June 21,

1934, is not an entirely new piece of administrative machinery. It has its roots deep in the past."[1]

The long history of adjustment board procedure in the settlement of rail employer-employee disputes was fully considered by Congress in the enactment of the 1934 amendments to the Railway Labor Act. In the hearings on the 1934 amendments Mr. M. W. Clement, Chairman of the Committee on Railroads delegated to deal with the proposed amendments to the Railway Labor Act, in addressing the Senate Committee on Interstate Commerce, stated:[2]

> "*None of the things proposed in this bill is new.* We have had national boards, both in the boards of adjustment during the Government administration of railroads and in the United States Labor Board. We have had regional boards. We have had system boards. We have had Presidents' emergency boards, and we have had arbitration boards."

Throughout the Senate and House Committee Hearings on the 1934 amendments to the Railway Labor Act, frequent reference was made to the national boards of adjustment established during the period of Federal control of the railroads in 1918 under the United States Railroad Administration.[3] As recognized by the National Mediation Board in its First Annual Report:[4]

> "The orders, policies, and practices of the railroad administration laid the basis for many of the provisions later embodied in the Railway Labor Act."

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[1] Spencer, *The National Railroad Adjustment Board* (1938), at page 151 of the Appendix to *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board.*

[2] *Hearings Before the Committee on Interstate Commerce, United States Senate,* 73rd Congress, Second Session on S. 3266, a Bill to Amend the Railway Labor Act, at page 67.

[3] See pages 15, 17, 19, 28, 30, 33, 34, 67 of the *Hearings Before the Committee on Interstate Commerce, United States Senate,* 73rd Congress, Second Session on S. 3266; and see pages 45, 47, 80, 81 of the *Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives,* 73rd Congress, Second Session on H. R. 7650.

[4] *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (For the Fiscal Year Ended June 30, 1935) at page 63, Library of Congress, Washington, D. C.

Likewise, Congress was thoroughly familiar with the four voluntary regional boards of adjustment which were created after the period of Federal control of the railroads to hear and determine the disputes of train and yard service employees, including yardmasters, and which functioned up to the time of the 1934 amendments to the Railway Labor Act.[5]

Recognition was further given to these historical antecedents of the National Railroad Adjustment Board by the statement in the Senate Hearings on the 1934 amendments that:

> "The bill is designed to maintain *substantially the same method* as is now provided in the railway labor act for the adjustment of labor relations between the railroads and the employees."[6]

Notwithstanding that the National Railroad Adjustment Board established by the 1934 amendments to the Railway Labor Act is not a new piece of administrative machinery but simply the legislative pattern of voluntary boards of adjustment which had existed for many years, the lower courts erroneously concluded that the historical background of the Adjustment Board was "not helpful in determining the question" (R. 227, 277).

National Boards for the settlement of rail employee disputes were created and functioned for the first time during the period of Federal control of the railroads in World War I. In 1918 the Director General of Railroads established three national boards of adjustment known as Railroad Board of Adjustment No. 1,[7] Railroad Board of

[5] Senate Hearings at pages 15, 33 and 67; House Hearings at pages 45 and 81.

[6] Statement of George M. Harrison, Chairman of the Legislative Committee of the Railway Labor Executives Association speaking for the 21 standard railway labor organizations which sponsored the 1934 amendments to the Railway Labor Act at page 28 of the Senate Hearings on S. 3266.

[7] General Order No. 13, issued by the Director General of Railroads on March 22, 1918, is set forth in the *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board*, Book two, Appendix page 19-22.

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Adjustment No. 2,[8] and Railroad Board of Adjustment No. 3.[9]

The general orders of the Director-General of Railroads establishing these three national boards of adjustment are substantially identical in terminology. All three boards were bipartisan and composed of an equal number of representatives selected by the Carriers and by the rail brotherhoods. Each board was given jurisdiction over "all controversies growing out of the interpretation or application of the provisions of the wage schedules or agreements which are not promptly adjusted by the officials and the employees on any one of the railroads operated by the government * * *."[10]

Railroad Board of Adjustment No. 1 was composed of eight members, four of whom were selected by the regional directors of the railroads and four by the following rail brotherhoods: Brotherhood of Locomotive Engineers, Order of Railway Conductors, Brotherhood of Railroad Trainmen, Brotherhood of Locomotive Firemen and Enginemen. This Board heard the disputes of *train and yard service*

[8] General Order No. 29, issued by the Director General of Railroads on May 31, 1918, is set out in the Attorney General's Inquiry in Book two, Appendix page 23-26.

[9] General Order No. 53, issued by the Director General on November 12, 1918, is set out in the Inquiry of the Attorney General's Committee, Book two, Appendix page 27-30.

[10] See General Orders No. 13, 29 and 53 (referred to at footnotes 7, 8 and 9). Each of these Orders incorporated an agreement between the carriers and the national labor organizations which provided in part:

"Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of a railroad and its employees, covered by this understanding, *will be handled in their usual manner* by general committee of the employees *up to and including the chief operating officer of the railroad* (or someone officially designated by him), when, if an agreement is not reached, the chairman of the general committee of employees may refer the matter to the chief executive officer of the organization concerned, and if the contention of the employees' committee is approved by such executive officer, then the chief operating officer of the railroad and the chief executive officer of the organization concerned shall refer the matter, with all supporting papers; to the Director of the Division of Labor of the United States Railroad Administration, who will in turn present the case to the Railway Board of Adjustment No. 1, which Board shall promptly hear and decide the case, *giving due notice to the chief operating officer of the railroad interested and to the chief executive officer of the organization concerned of the time set for hearing.*"

employees, including yardmasters. (R. 206-207, Plaintiffs' Exhibits A and B).

Railway Board of Adjustment No. 2 was composed of twelve members, 6 of whom were selected by the regional directors of the railroads and 6 by the following rail brotherhoods representing shop craft employees: International Association of Machinists; International Association of Boilermakers, Iron Shipbuilders and Helpers of America; International Brotherhood of Blacksmiths and Helpers; Brotherhood of Railway Carmen of America; Amalgamated Sheet Metal Workers International Alliance; International Brotherhood of Electrical Workers.

Railway Board of Adjustment No. 3 was composed of eight members, four selected by the regional directors of the railroads and four by the following organizations: Order of Railway Telegraphers; Brotherhood of Railway Clerks; Switchmen's Union of North America; United Brotherhood of Maintenance of Way Employees and Railroad Shop Laborers. The Switchmen's Union represents yard-service employees, including yardmasters, and the disputes of employees represented by this craft were transferred to the First Division of the National Railroad Adjustment Board by the 1934 Amendments.

Because it was not practicable to create adjustment boards for unorganized employees and the small organizations, the United States Railroad Administration issued circular No. 3 on August 30, 1918, directing these employees to submit their disputes to the director of the Division of Labor.[11]

With the end of Federal control of the railroads, boards of adjustment on a national basis were terminated. The Transportation Act, effective February 28, 1920, provided in Section 302 as follows:[12]

[11] *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board*, Book 2, Appendix page 30-32.

[12] C. 91, 41 Stat. 456; *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board*, Book 2, Appendix page 33-39.

"Railroad boards of adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof." [13]

Section 304 of the Transportation Act also established the Railroad Labor Board, a tripartite board composed of representatives of management, labor and the public. Section 307 of the Transportation Act provided that this board should have jurisdiction of disputes in which any adjustment board "failed or will fail to reach a decision within a reasonable time." It was further provided that in case the appropriate adjustment board was not organized the labor board, under certain circumstances, should hear and decide disputes involving rules or working conditions.

Under the Transportation Act of 1920, the national rail organizations representing train and yard service employees were successful in establishing regional boards of adjustment. Insofar as train and yard service employees were concerned, these regional boards were patterned after and continued the function of Railroad Board of Adjustment No. 1. By agreements executed in 1921 between certain rail carriers and the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and the Brother-

[13] Under the Transportation Act of 1920 Boards of Adjustment were not generally established. Because of the success of the National Adjustment Boards under the United States Railroad Administration, the employees wanted national adjustment boards. The carriers objected to national adjustment boards preferring system boards. The history of this period is stated by Johnson in *Government Regulation of Transportation* as follows:

"The purpose of the statute (Transportation Act of 1920) was to have disputes or disagreements as to working conditions reach the National Railroad Labor Board only upon appeal from a decision of a regional or national adjustment board; but the statute did not work out in practice as had been planned. The adjustment boards were not established. What the railway unions wanted was the continuance of the national agreements that they had secured during the favorable period of government operation, while the carriers did not favor the establishment of adjustment boards composed only of representatives of the employees and the carriers." Johnson, *Government Regulation of Transportation*, (1938) at page 187; See also Wolf, *The Railroad Labor Board*, (1927) at pages 52-55.

hood of Railroad Trainmen, representing train and yard service employees, three regional boards of adjustment were created, known as the Train Service Board of Adjustment for the Southeastern Region, the Train Service Board of Adjustment for the Western Region, and the Train Service Board of Adjustment (Eastern).[14]

These three boards heard the disputes of *train and yard service employees, including yardmasters* (R. 207-109).[15]

Title 3 of the Transportation Act of 1920 was repealed by the Railway Labor Act of 1926 which provided in Section 3 as follows:[16]

> "Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees."

The three regional boards referred to above which were created to hear the disputes of train and yard service employees continued to function under the Railway Labor Act of 1926. In addition, certain carriers and the four rail brotherhoods representing train and yard service employees by agreement dated April 4, 1928, established a fourth board known as the "Southwestern Regional Train Service Board of Adjustment."[17]

This board also heard the disputes of *train and yard service employees, including yardmaster disputes* (R. 208).[18]

The history of adjustment boards beginning with the end of Federal control to the enactment of the amendments to the Railway Labor Act in 1934 is one of struggle on the part of the rail unions to establish national adjustment boards patterned after the boards established under Fed-

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[14] *Inquiry of Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board*, Book 2, Appendix pages 39-56.

[15] Identified as Plaintiffs' Exhibits D, G, F, and J.

[16] C. 347, S. 3, 44 Stat. 578, 45 U. S. C. A. Section 153 (Historical note); *Inquiry of Attorney General's Committee*, Appendix page 62-73.

[17] *Inquiry of Attorney General's Committee*, Appendix page 57-61.

[18] Identified as plaintiffs' Exhibits H and I.

eral control.[19] The rail brotherhoods representing train and yard service employees, however, were able to obtain the establishment of regional boards of adjustment patterned after Railroad Board of Adjustment No. 1 established during the period of the United States railroad administration. And throughout this period the *disputes of yardmasters* were heard *along with* the disputes of the other train and yard service employees represented by the four operating brotherhoods.

A comparison of the First Division of the National Railroad Adjustment Board with Railroad Adjustment Board No. 1 created during the period of Federal control of the railroads in 1918, and the regional boards of adjustment which followed it, must establish beyond dispute that in designating the craft jurisdiction of the First Division Congress *intended* to and did follow the *pattern* of the earlier boards so as to group within the First Division the train and yard service employees, generally known as the operating crafts, which include the yardmaster craft.[20]

The alignment of crafts was not changed from that prevailing in the period of Federal control. The First Division which hears the disputes of train and yard service employees is identical to Railroad Adjustment Board No. 1, and the four regional boards which followed it, the only change being that *all* the train and yard service employees, irrespective of union affiliation, are under the jurisdiction of the First Division. The Second Division hears the disputes of the shop craft employees as did Railroad Board of Adjustment No. 2 in the period of Federal control. The

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[19] Fisher, *Industrial Disputes and Federal Legislation* (1940); Johnson, *Government Regulation of Transportation* (1938); Wolfe, *Railroad Labor Board* (1927); Alderman, *The History of Federal Legislation: Hearings Before the Committee on Interstate Commerce*, United States Senate on S. 3266, at pages 15, 30 and 67; *Hearings before the Committee on Interstate and Foreign Commerce*, House of Representatives on H. R. 7650, pages 45, 80.

[20] "The orders, policies, and practices of the Railroad Administration laid the basis for many of the provisions later embodied in the Railway Labor Act." *First Annual Report of the National Mediation Board* for the Fiscal Year ended June 30, 1935, at page 63; See also the statement that the Railway Labor Act "borrowed freely from the phraseology" of General Order 13 at page 358 of the *Inquiry of the Attorney General's Committee*.

Third Division hears the disputes of telegraphers, clerks and maintenance of way employees as did Railroad Board of Adjustment No. 3 under Federal control and in addition there has been added train dispatchers, freight handlers, station and store employees, signalmen, sleeping car conductors, sleeping car porters and maids and dining car employees.

Yardmasters have submitted their disputes to boards which heard disputes of train and yard craft employees for many years and there is not a scintilla of evidence in the Congressional Hearings to indicate that Congress intended to exclude them from the jurisdiction of the First Division of the Adjustment Board.

The 1934 amendments to the Railway Labor Act which created the National Railroad Adjustment Board to function in four independent divisions were sponsored by the Railway Labor Executives Association composed of 21 standard rail organizations.[21] The enumeration of crafts in the first three divisions of the National Railroad Adjustment Board was undoubtedly intended to encompass the crafts represented by the rail organizations. However, the 1934 amendments fixed the jurisdiction of the several Divisions of the Adjustment Board by craft designation rather than by union affiliation in order that *all* employees within these craft designations could have their grievances presented to a division of the adjustment board.[22]

Upon the establishment of the National Railroad Adjustment Board, the First Division had no difficulty in determining its jurisdiction of train and yard service employees, including yardmasters.[23] In its first report to Congress the Board stated:[24]

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[21] *Hearings Before the Committee on Interstate Commerce, United States Senate*, page 27; *Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives*, page 77.

[22] *Hearings Before the Committee on Interstate and Foreign Commerce*, House of Representatives, page 83.

[23] The First Division of the Adjustment Board has heard and entered awards in the disputes of the following rail crafts: engineer, helper engineer, firemen, conductor, assistant conductor, ticket collector, pilot, brakemen, flagmen, baggagemen, general yardmaster, assistant yardmaster, yardmaster,

"Award No. 4150, so far as Long is concerned, removed him from the second trick assignment, (of assistant yardmaster) as he was permitted to take same contrary to the agreement. This would restore Long's status on the third trick assignment the same as though he had not taken the second trick assignment."

According to the jurisdictional distinction drawn by the Circuit Court of Appeals, Assistant Yardmaster Long could complain to the Fourth Division and have the entire issue of his re-assignment redetermined by that Division. Hairline distinctions creating jurisdictional conflicts of this nature were never intended by Congress in defining the jurisdiction of the divisions of the Adjustment Board. Obviously all awards involving yardmasters and their rights to hold a yardmaster assignment "involve yardmasters" even though the claim may be submitted on behalf of some other yard employee claiming seniority to the position in opposition to the yardmaster incumbent.

Included also in the 19 awards are Awards Nos. 2364, 2490, 3609, 3610, 4548 and 4584.[13] Generally, these awards involve claims that yard employees have not been assigned to yardmaster positions or to work as extra yardmasters on relief days in accord with the seniority rules of collective agreements.

Fourth, the conclusion of the Circuit Court that the assumption of jurisdiction of yardmaster disputes by the First Division had been inadvertent is clearly erroneous. Prior to 1938, the members of the First Division appear to have been in complete agreement as to the jurisdiction of that Division to hear yardmaster cases.[14] More-

[13] R. 210, Plaintiffs' Exhibit K.

[14] See Award No. 1274, decided July 13, 1935; Award No. 1603, decided December 14, 1936; Award Nos. 1648 and 1649, decided January 21, 1937; and Award Nos. 1896 and 1897, decided April 14, 1937. (R. 210, Plaintiffs' Exhibit K). While a referee was appointed for some of these cases, there is no indication that the Board was divided on any question other than the merits of the decision. And the First Division asserted that it had taken over the work of the four regional boards, *all of which heard yardmaster disputes.* See 1935 Annual Report at page 46.

over, the jurisdictional question, if any, could not have been merely ignored or overlooked by the First Division in view of the deadlock among the members of the Fourth Division on this question, this deadlock being *reported in the 1936, 1937 and 1938 Annual Reports of the Adjustment Board.*[15]

Actually the question of the jurisdiction of the First Division over cases involving railroad yardmasters was fully argued by the members of that Division. On March 1, 1938, the carrier members of the First Division submitted a brief,[16] to the Honorable Frank M. Swacker, referee sitting with the First Division, with copies to the labor members of that Division, contending that the First Division did not have jurisdiction of yardmaster disputes. The brief of the carrier members was submitted in consideration of Dockets 1198, 4503, 4504 and 4505 then pending before the First Division. Docket 1198 (Award No. 2710) concerned the claim of a yardmaster complaining of wrongful displacement;[17] Docket 4503 (Award No. 2711),[18] and Docket 4504 (Award No. 2712)[19] involve claims of yardmasters alleging wrongful discharge. Docket 4505 (Award No. 2713)[20] involves the claim of a yardmaster for wrongful displacement.

In their brief to Referee Swacker, the carrier members stated:

"The undersigned members of the National Railroad

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[15] See page 46 of the 1936 Annual Report, page 34 of the 1937 Annual Report, and page 46 of the 1938 Annual Report of the Adjustment Board.

[16] By stipulation of petitioners and respondents, filed with the Clerk of this Court, the parties have agreed that this document may be referred to as part of the record in this cause. The brief of the carrier members of March 1, 1938, is accompanied by the affidavit of R. A. Knoff, carrier member of the First Division, this affidavit being dated October 14, 1945. This document was submitted to the Circuit Court by the respondents at the time of oral argument.

[17] This Award was not introduced as an Exhibit by either party in this cause but is contained in the published Awards of the First Division, Library of Congress, Washington, D. C., and for the convenience of the court it is set forth in Appendix III of this brief.

[18] Not introduced as an Exhibit but contained in the published Awards of the First Division. This award relates to the same circumstances as those before the First Division in Award No. 2712 (R. 75-88).

[19] R. 75-88, Plaintiffs' Exhibit G.

[20] R. 210, Plaintiffs' Exhibit K.

"The First Division of the National Railroad Adjustment Board *took over the work of the four regional boards*, adding thereto representation of many railroads not parties to any of the regional boards, and adding, also, the Switchmen's Union of North America as a party to the First Division.

The abolition of these four regional boards left, pending and unadjusted, approximately 1,200 cases for the First Division, which cases had to be revamped to conform reasonably to the requirements of this Division, and submitted to it."

As noted heretofore, the work of the four regional boards consisted of hearing and deciding disputes of train and yard service employees, *including the disputes of yardmasters* (R. 207-209).[25]

Obviously at the time of the 1934 amendments to the Railway Labor Act, those familiar with the background of these amendments and their purpose and who were charged with placing them in operation understood and recognized that yardmaster disputes were properly cognizable in the First Division of the Adjustment Board.

Notwithstanding the relevance of these facts in interpreting the intent of Congress on the question in dispute, the lower courts stated that the historical background of the First Division of the Adjustment Board was "not helpful in determining the question" (R. 227, 277). This erroneous conclusion is based on the fact that during the period of Federal control of the railroads and the period of the regional boards of adjustment preceding the establishment of the National Railroad Adjustment Board, a

night yardmaster, footboard yardmaster, yard conductor, yard foremen, yard helper, yard brakemen, switchtender, engine herder, car retarder operator, hostler, hostler helper, outside hostler, inside hostler, engine watchmen and engine messenger. See published awards of the First Division of the National Railroad Adjustment Board and Index thereto, Library of Congress, Washington, D. C.

[24] *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (For the Fiscal Year Ended June 30, 1935) at page 16.

[25] Identified as plaintiffs' Exhibits E, F, G, H, I and J.

few train and yard service employees did not submit their disputes to these earlier boards of adjustment because these employees were not members of and were not directly represented by the four national rail organizations which represent the great majority of the employees in the operating crafts.

Just how this fact *completely destroys* the value of the historical background of the Railway Labor Act as a factor in determining the intent of Congress is not explained. Clearly, even though the lower courts felt that an examination of the historical background of the Act did not *conclusively* settle the issue, certainly it was relevant and persuasive as to Congressional intent and not to be dismissed *entirely* as "not helpful in determining the question."

Congress must be presumed to have been familiar with the past history of the former adjustment boards and the fact that yardmaster disputes had been heard by these boards along with the disputes of the other train and yard service operating crafts. If Congress had intended to narrow and circumscribe the jurisdiction of the First Division so as to exclude yardmaster disputes, it would have been easy to use apt language declaratory of its purpose. It is inconceivable that Congress used the general term "yard-service employees," commonly understood to include yardmasters as well as all other yard operating crafts, with the intent that yardmasters were to be segregated from their historical setting and their disputes excluded from the jurisdiction of the First Division so as to fall to the Fourth Division composed of marine representatives.

Petitioners submit that the lower courts erred in their consideration of the historical background of the Railway Labor Act.

This court has repeatedly emphasized that in the determination of the construction to be placed on an act of Congress, reference must be made to the history of the times in which the Act was passed. *United States vs. American Trucking Associations*, 310 U. S. 534; *Helvering vs. New*

York Trust Company, 292 U. S. 454; *Norwegian Nitrogen Products Company vs. United States*, 288 U. S. 294; *Great Northern Railway Company vs. United States*, 315 U. S. 262.

In the case last cited, this court said:

> "But we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and, 'courts, in construing a statute, may with propriety refer to the history of the times when it was passed'."

As stated by Judge Howe in *The Penza*, 2nd Cir., 9 Fed. 2d. 527:

> "It is always assumed that statutes are passed in the light of, and with reference to pre-existing law * * *."

II.

ADMINISTRATIVE INTERPRETATION OF THE JURISDICTION OF THE FIRST DIVISION

Following the enactment of the 1934 amendments to the Railway Labor Act, the carrier and labor members of the First Division of the Adjustment Board, all expert in the rail industry and familiar with the past history of adjustment boards, assumed jurisdiction of disputes involving train and yard-service employees, including yardmasters.[1]

In common recognition of the jurisdiction of the First Division, *both the rail carriers and the rail labor organizations joined in submitting disputes involving yardmasters*

[1] *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (For the Fiscal Year Ended June 30, 1938) at pages 46 and 51.

to the First Division (R. 210, Plaintiffs' Exhibit K). The Railroad Yardmasters of America, however, declined to accept the jurisdiction of the First Division over yardmaster disputes and submitted several such disputes to the Fourth Division, composed of representatives of carriers directly or indirectly engaged in transportation by water and representatives of labor organizations representing marine employees. The Fourth Division promptly deadlocked on the question of divisional jurisdiction over disputes involving yardmasters (R. 231),[2] and remained deadlocked until the collusive decree in Chancery No. 16031 was entered on July 11, 1938 (R. 231).[3] Yardmaster cases were heard and decided by the Fourth Division for the first time *following the entry of the decree in Chancery No. 16031 and under its compulsion* (R. 231).

In spite of the situation prevailing in the Fourth Division of the Adjustment Board, the First Division, composed of rail experts, heard and decided disputes involving yardmasters, both *before* and *subsequent* to the entry of Decree in Chancery No. 16031, and continued to hear such disputes until August, 1941 (R. 231).

The District Court, in failing to give weight to the administrative construction of the Railway Labor Act by the First Division of the Adjustment Board, indicated a misunderstanding of the facts. In its opinion the District Court stated (R. 227):

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[2] The *Second Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (For the Fiscal Year Ended June 30, 1936) at page 46, reports the deadlock of the Fourth Division on the question of divisional jurisdiction of a dispute submitted to it by the Railroad Yardmasters of America. Likewise, in the Third and Fourth Annual Reports of the Adjustment Board for the fiscal years ended June 30, 1937, and June 30, 1938, at pages 34 and 46, respectively, the Fourth Division reported the deadlock of that Division on the question of divisional jurisdiction of cases involving railroad yardmasters.

[3] While the Fourth Annual Report of the Adjustment Board for the fiscal year ended June 30, 1938, reflects the continuing deadlock of the Fourth Division on the question of the jurisdiction of that Division to hear yardmaster cases, (see page 46) subsequent Annual Reports, beginning with the Report of June 30, 1939, reflect the determination of yardmaster cases by the Fourth Division.

"Prior to the decision of this court in Case 16031 several disputes involving yardmasters had been heard and determined by the first division. *That fact might be quite persuasive as to the meaning to be given the term yardmasters were it not that the fourth division had also heard and determined certain such cases.* Each Division seemed to be of the opinion that it had jurisdiction of such disputes."

The trial court recognized one of the cardinal rules of statutory interpretation when it indicated that the conceded fact that the First Division had heard disputes involving yardmasters prior to August, 1941, was quite persuasive of the intent of Congress. The quotation from the opinion above set forth demonstrates that the court would have reached an entirely different conclusion than it did except for the *erroneous assumption* that the Fourth Division, *before* the default Decree in Chancery No. 16031, *had also* considered and decided cases involving yardmasters. This assumption is directly contrary to the record. The record is undisputed that *before* the collusive decree in Chancery 16031, the Fourth Division had never accepted or decided a case involving a railroad yardmaster!

Obviously, if the First Division, composed of ten *rail* experts designated by the carriers and by the national rail operating brotherhoods, assumed jurisdiction and heard yardmaster cases, that fact must have great weight in the determination of the meaning of the term "yard-service employees" as used by Congress.

In considering this issue the Circuit Court referred to 19 awards of the First Division submitted in evidence by the petitioners, all of which will be found under the heading "yard service," subheading "yardmasters," in the Index to the decisions of the First Division. The 19 decisions are Award Nos. 1274, 1603, 1648, 1649, 1896, 1897, 2364, 2490, 2491, 2712, 2713, 2970, 3609, 3610, 4077, 4117, 4150, 4548 and 4584. These awards are identified as Plaintiffs' Exhibit K (R. 210), except Awards 4077, 4150 and 2712 which are Ex-

hibits E, F, and G, respectively, attached to plaintiffs' petition (R. 37, 52, 75).

The Circuit Court was of the opinion that of these 19 awards by the First Division only three cases, involving yardmasters complaining of wrongful demotion, discharge, or displacement, "relate to disputes involving yardmasters in the proper sense of that term" (R. 277).

As to these 19 awards by the First Division, the Circuit Court further stated (R. 277):

> "In none of these awards was there *any discussion* of the jurisdictional question depending upon the interpretation of 'yard-service employees.' The award *merely recited*, as in all awards: 'This Division of the Adjustment Board has jurisdiction over the dispute involved herein.'
>
> "Whenever the question involved in this case has been given *specific attention*, the First Division has deadlocked. The labor members wished to accept yardmaster cases, and carrier members refused."

The petitioners submit that the Circuit Court erred in its conclusions in at least four respects.

First, it is inconceivable that a court may impeach a jurisdictional finding of a division of the Adjustment Board by *speculation* that for lack of discussion in the printed award the jurisdictional finding was probably inadvertent and made without the "specific attention" of the Board to the question of its jurisdiction over the dispute. In view of the distribution of jurisdiction among the several divisions of the Adjustment Board the question of jurisdiction is an ever present one. It is necessarily in the minds of both the organization and the carrier in the submission of every case to the Adjustment Board. Likewise, in a bipartisan board, composed of representatives of both parties, alert to challenge the respective positions of the other party in each case, it is inconceivable that the ten rail members of the First Division would make any jurisdictional finding

inadvertently or without a question being raised concerning the issue, if any doubt existed in the mind of any of the members.

Second, the Circuit Court's conclusion that there had been *only three cases* "involving yardmasters" is utterly erroneous. The respondents in their brief to the Circuit Court admitted that Award 1649 (yardmaster complaining of wrongful demotion),[4] Award 1896 (yardmasters complaining of wrongful displacement),[5] Award 2712 (yardmaster complaining of wrongful discharge),[6] Award 2713 (yardmaster complaining of wrongful displacement),[7] and Award 4117 (yardmaster claiming rate of pay under one agreement rather than another),[8] were unquestionably "yardmaster cases." Aside from these cases, Award No. 2970 ruled on a yardmaster complaint concerning claims for overtime;[9] Award 2710 of the First Division (set out in Appendix III of this brief) concerns the complaint of a night yardmaster of wrongful displacement; and Award 2711[10] of the First Division also determined the claim of an assistant yardmaster of wrongful discharge. Even by the narrow jurisdictional interpretation of the Circuit Court, these eight cases are decisions "involving" yardmasters, and, as will be noted hereafter, the members of the First Division gave specific attention to the jurisdictional question.

Third, the Circuit Court's conclusion that the only cases which relate to disputes "involving" yardmasters decided by the First Division are those in which the complaint is filed on behalf of a yardmaster is likewise erroneous. Certain disputes submitted to the First Division of the Ad-

[4] R. 210, Plaintiffs' Exhibit K.
[5] R. 210, Plaintiffs' Exhibit K.
[6] R. 75, Exhibit G, attached to Plaintiffs' petition.
[7] R. 210, Plaintiffs' Exhibit K.
[8] R. 210, Plaintiffs' Exhibit K.
[9] R. 210, Plaintiffs' Exhibit K.
[10] Awards 2710 and 2711 were not introduced as exhibits but are contained in the published awards of the First Division of the National Railroad Adjustment Board in the Library of Congress, Washington, D. C., and are referred to in the brief of the carrier members to Referee Frank M. Swacker of March 1, 1938, to which reference is made by stipulation of the parties filed in this court.

justment Board involved yardmasters by reason of seniority questions concerning rights of appointment to the yardmaster position. In this type of case an employee, generally a yard foreman or switchman, complained that the carrier violated seniority rules in an appointment to a yardmaster vacancy occurring in the yardmaster position in the yard. In such cases the carrier defended the rights of the yardmaster incumbent to the position and the First Division of the Adjustment Board determined the respective rights of the yardmaster incumbent, appointed by the carrier, and the claimant to the position. Where the Adjustment Board sustained the claimant's right to the yardmaster position the Board necessarily ruled that the yardmaster incumbent was not entitled to the position and was improperly appointed to the position in violation of seniority rules. The carrier, to carry the award into effect, necessarily displaced the yardmaster incumbent by the successful claimant.

Illustrative of such cases are Awards Nos. 1274, 1603, 1648, 1897, 2491, 4077 and 4150 in which yard employees claimed a violation of seniority rules in the appointment of yardmasters.[11] All of these awards involve *conflicting claims* to a yardmaster position by the yardmaster incumbent and some other yard employee. For instance, in Award 4150 (R. 52-74) the carrier had assigned one F. H. Long, employed as an assistant yardmaster on the 11:00 P.M. shift (or third trick) as assistant yardmaster on the 3:00 P.M. shift (or second trick). One C. E. Halbrook, employed as a switchman, contended that he was senior to Long and entitled to the appointment of assistant yardmaster on the 3:00 P.M. shift. The Board sustained switchman Halbrook's claim.

In interpreting the decision in Award No. 4150, the First Division in Award 6293 stated:[12]

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[11] Awards Nos. 1274, 1603, 1648, 1897 and 2491 appear in Plaintiffs' Exhibit K, R. 210; Award 4077 appears at R. 37-52; and Award 4150 appears at R. 52-74.

[12] Award No. 6293 is not an exhibit in the record but is published in the awards of First Division of Adjustment Board, Library of Congress, Washington, D. C.

> Adjustment Board—First Division, beg leave to submit that the basic issue between the membership of this division *is a dispute as to which of two Divisions of the National Railroad Adjustment Board, i.e., the First or Fourth Division, has jurisdiction over yardmasters*, the class of employees involved in Docket Nos. 1198, 4503, 4504 and 4505, and to avoid any misunderstanding about the issue please let it be clearly understood that insofar as we are concerned, no formal discussion having been had, no disagreement exists over the making of an award on the merits of these four dockets. *The sole discussion had thus far has resolved itself into a disagreement over the question of which division has jurisdiction over yardmasters.* We contend the amended Act expressly confers upon the Fourth Division jurisdiction over disputes that arise between the carriers and yardmasters."

It is significant that while the carrier members of the First Division questioned the jurisdiction of that Division over yardmaster disputes, it did not occur to the rail carriers who were parties to the yardmaster disputes in Docket Nos. 1198, 4503, 4504 and 4505, to raise this contention. In fact, the carriers *joined* with the organizations in submitting these disputes to the First Division.

The carrier members of the First Division, whether or not convinced in *private* discussion that their position was without merit, entered no *public* protest or dissent of record and in each of the cases in the published Awards Nos. 2710 (Docket 1198), 2711 (Docket 4503), 2712 (Docket 4504), and 2713 (Docket 4505), all decided March 31, 1938, a finding of jurisdiction purportedly made by the entire First Division was entered as follows:

> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein."

In making this finding there can be no question but that it and similar findings in other yardmaster cases had the

full consideration of the entire membership of the First Division of the Adjustment Board.

Following the decisions in Awards Nos. 2710, 2711, 2712 and 2713, on March 31, 1938, the collusive Decree in Chancery 16031 was entered on July 11, 1938, which ordered and compelled the Fourth Division to assume jurisdiction and hear and determine yardmaster disputes. (R. 177-181, 231). Notwithstanding this fact, the First Division continued to assert jurisdiction and hear and determine cases involving yardmasters after July 11, 1938. See Award Nos. 2970, 3609, 3610, 4117, 4548 (R. 210, plaintiffs' Exhibit K), Award No. 4077 (R. 37-52) and Award No. 4150 (R. 52-74).[21] It was not until August 28, 1941, that the carrier members of the First Division resurrected the collusive decree in Chancery 16031 as a reason for their assertion that they would not agree to set down or participate in the hearing of yardmaster cases. (R. 186-188, 230-231).

Summarizing the actions of the Adjustment Board, the following facts appear of record:

1. Following the establishment of the National Railroad Adjustment Board by the 1934 amendments to the Railway Labor Act, the First Division of the Board assumed the work of the four regional Boards, taking over the accumulation of cases before the regional Boards, including disputes involving yardmasters. Subsequently jurisdiction in disputes involving yardmasters was repeatedly asserted in the published Awards of the First Division and such disputes were heard and decided by the First Division until August, 1941, when the carrier members refused to docket such cases for hearing on the sole basis that Chancery Decree 16031 had confirmed jurisdiction in such cases in the Fourth Division (R. 230-231, 186-198).

2. The Fourth Division assumed jurisdiction over yardmaster disputes only following the order of Decree in Chan-

[21] See also Awards Nos. 3383 and 4078 in the published Awards of the First Division, Library of Congress, Washington, D. C.

cery 16031 on July 12, 1938, and under its compulsion (R. 231).

3. With the enactment of the 1934 amendments to the Railway Labor Act, the rail labor organizations, the rail carriers and the members of the First Division of the Adjustment Board were in agreement that yardmaster disputes were within the jurisdiction of the First Division. The first disagreement, other than the jurisdictional deadlock in the Fourth Division precipitated by the Railroad Yardmasters of America, appears to have occurred in the course of private discussion among the members of the First Division in connection with the determination of the cases in Dockets 1198, 4503, 4504 and 4505. Nevertheless, the published Awards of the First Division contained a finding of jurisdiction in that Division in these cases and other yardmaster cases and the First Division continued to hear and determine yardmaster disputes until August, 1941 (R. 230-231, 210 Plaintiffs' Exhibit K).

4. Prior to 1938, no carrier protested the jurisdiction of the First Division over yardmaster cases. In fact, the carriers joined with the labor organizations in submitting such cases to the First Division. Subsequent to Decree in Chancery No. 16031 on July 11, 1938, the question of the jurisdiction of the First Division in yardmaster cases has been raised only sporadically by the carriers in yardmaster disputes submitted to the First Division (R. 210, Plaintiffs' Exhibit K).

It is submitted that such unanimity of understanding by the carriers, the labor organizations, and the members of the Adjustment Board would have been impossible if the term "yard-service employees" had been commonly understood in the rail industry as exclusive of yardmasters.

III

YARDMASTERS HAVE BEEN HISTORICALLY GROUPED AS TRANSPORTATION OPERATING EMPLOYEES AND HAVE BEEN CONSISTENTLY RECOGNIZED AND REFERRED TO AS EMPLOYED IN YARD SERVICE

The universal and accepted use of the term "yard service employees" as designating all crafts, including the yardmaster craft, whose work is directly connected with yard operation and the movement and switching of trains and cars in a railroad yard, is a matter of official record. Government agencies intimately associated with the railroads over long years, the rail carriers, and the rail employee organizations have repeatedly recognized this established and accepted usage in the rail industry.

The National Mediation Board, the First Division of the National Railroad Adjustment Board representative of both rail carriers and rail labor organizations, the Interstate Commerce Commission, the 1943 Emergency Board appointed under the Railway Labor Act to hear the wage demands of train and yard service employees, the Railroad Retirement Board, the United States Railroad Labor Board, and other rail experts have specifically grouped and referred to yardmasters in reports to Congress and in other official documents as operating employees in yard service. The uniformity of terminology used in these documentary references illustrates beyond controversy the established and accepted use of the term "yard service employees" as inclusive of yardmasters.

The First Division of the National Railroad Adjustment Board in its First Annual Report to Congress signed by Mr. Macy Nicholson, the board member representing the rail carrier group, and Mr. William Bishop, the board member representing the labor members on the First Division,

listed in the report the cases decided by the First Division *classified as to subject matter*. "Yardmaster" cases were classified under the heading "*yard service.*"[1]

It is emphasized that this is the *joint* report of the carrier and labor members of the First Division to Congress, made at a time when no thought was in mind of disrupting the work of the Board. It was made in recognition by the First Division that it had taken over the work of the four regional Boards, including yardmaster disputes. It is an affirmative acknowledgment by ten rail experts representative both of rail carriers and rail employee organizations that yardmasters are in yard service and within the jurisdiction of the First Division of the Adjustment Board. This in itself should have been sufficient to outweigh the oral testimony of three interested witnesses that the term had never been understood in the industry to include yardmasters.

The National Mediation Board likewise in its First Annual Report to Congress listed in Table VII the agreements between Class I carriers and their employees by craft or class and included *yardmaster* agreements within the "engine, train and *yard service*" group. In Table VII the Board indicated that the national labor organizations representing "yard service employees," including *yardmasters*, had agreements with 132 Class I carriers. It also indicated that system associations representing "yard-service employees" had agreements with 28 carriers which "includes 20 separate agreements with *yardmasters* in addition to the agreement held by the national labor organization *for the other yard service employees.*"[2]

Also, the National Mediation Board by Table VIII listed agreements between Class I carriers and the organizations representing the various rail crafts.[3] Under the heading

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[1] *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the fiscal year ended June 30, 1935) at page 51.

[2] See footnote 3 to Table VII, page 33, of the *First Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the Fiscal Year Ended June 30, 1935).

[3] See Table VIII opposite page 36 in the *First Annual Report of the Na-*

"*yard-service employees*" the following organizations were named as holding agreements with rail carriers: Brotherhood of Railroad Trainmen, Order of Railway Conductors, Switchmen's Union of North America, Railroad Yardmasters of North America and System Associations. All of these organizations represent *yardmasters* and the Railroad Yardmasters of America, except for a few stationmasters, represents yardmasters exclusively. (R. 162). Clearly, the National Mediation Board recognized yardmasters as "yard-service employees."

The National Mediation Board in its Second Annual Report to Congress again included yardmasters under the heading "yard service employees."[4]

In the Third Annual Report of the National Mediation Board for the fiscal year ended June 30, 1937, agreements held by the organizations representing yardmasters are again included under the heading "Yard Service Employees."[5]

Beginning with the Fourth Annual Report of the National Mediation Board, and in subsequent reports, the summary by the National Mediation Board of collective labor agreements in effect between various labor organizations and carriers has not listed a tabulation under the heading "Yard Service Employees." Instead, the agreements between the carriers and the employee organizations listed in columns 1 to 6, inclusive, reflect agreements held by organizations representing employees whose disputes *are subject to the jurisdiction of the First Division* of the Adjustment Board, namely, engineers, firemen and hostlers, conductors, brakemen, flagmen and baggagemen, yard foremen, helpers, switchtenders *and yardmasters*.[6]

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tional Mediation Board Including the Report of the National Railroad Adjustment Board (For the Fiscal Year Ended June 30, 1935).

[4] *Second Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the fiscal year ended June 30, 1936) in Table IX, page 28, and Table X opposite page 28.

[5] *Third Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the Fiscal Year Ended June 30, 1937) in table X opposite page 24 of the report.

[6] See Table 13 opposite page 32 of the *Fourth Annual Report of the Na-*

Columns 7 through 13 reflect agreements held by organizations representing shop craft employees whose disputes are subject to the *Second Division* of the Adjustment Board, namely, machinists, boilermakers, blacksmiths, sheet metal workers, electrical workers, car men, coach cleaners, power house employees and railway shop laborers.

Columns 14 through 20, inclusive, reflect agreements held by organizations representing employees whose disputes are subject to the *Third Division* of the Adjustment Board, namely, clerks, office, station and storehouse employees, maintenance-of-way employees, telegraphers, signalmen, dispatchers, dining car stewards, dining car cooks and waiters.

Columns 21 through 23, inclusive, indicate contracts held by organizations representing marine employees whose disputes go to the *Fourth Division* of the Adjustment Board. Column 24 indicates contracts held by organizations representing a miscellaneous group of employees not reflected in other columns on the table of agreements. In the main the employees in this miscellaneous group, such as marine employees, train chair car attendants, train porters, (as distinguished from sleeping car porters) hotel and restaurant employees, printers, bus and truck drivers, patrolmen, special agents, and other police employees, night watchmen, laundry workers and seamstresses, stock claim agents, grain elevator employees, crossing tenders, gatemen, stock yard employees and others are employees whose disputes fall within the jurisdiction of the *Fourth Division*. The "catch-all" jurisdiction of the Fourth Division was obviously designed as a provision for these *miscellaneous* employees many of whom were *unorganized at the time of the enactment of the Railway Labor Act amendments in 1934.*

The National Railroad Adjustment Board in its Official

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tional Mediation Board Including the Report of The National Railroad Adjustment Board (For the Fiscal Year Ended June 30, 1938) and the corresponding Table of Agreements in the subsequent Annual Reports of the National Mediation Board.

Index Digest to the Awards of the First Division[7] has consistently classified disputes involving "yardmasters" as a sub-heading under the heading "yard service." In the "General Index" of these volumes, the awards involving yardmasters are digested under the heading of "yardmasters" which appears as a sub-heading under the general heading "yard service." The same index outline was followed by the Train Service Board of Adjustment for the Western Region in its Index of Decisions published March 28 and May 1, 1931.

This alignment of yardmasters with the other train and yard service crafts by the National Mediation Board and the National Railroad Adjustment Board is in accord with the long established practice in the railroad industry. As early as April 18, 1921, the Interstate Commerce Commission issued an order establishing "Rules Governing the Classification of Steam Railway Employees and Reports of Their Service and Compensation." The Interstate Commerce Commission by its order of April 18, 1921, classified all railroad employees under six general groups or headings which are as follows:[8]

I. Executives, Officials and Staff Assistants.
II. Professional, Clerical and General.
III. Maintenance of Way and Structures.
IV. Maintenance of Equipment and Stores.
V. Transportation (*Other Than Train, Engine, and Yard*).
VI(a). Transportation, (*Yardmasters*, Switch Tenders and Hostlers.)
(b). Transportation (Train and Engine Service).

Throughout the entire period from 1921 to date the Interstate Commerce Commission has followed the same align-

[7] Published in three volumes on July 1, 1939, March 1, 1941 and March 1, 1943, Library of Congress, Washington, D. C.

[8] The order of the Interstate Commerce Commission of April 18, 1921, is set out in full by the United States Railroad Labor Board in *Wage Series, Report No. 2, Rules for Reporting Information on Railroad Employees, Together With a Classification and Index of Steam Railroad Occupations.* Library of Congress, Washington, D. C.

ment of rail employees by groups as set forth in the original order of April 18, 1921.[9] Thus, for long years the Interstate Commerce Commision has grouped yardmasters with the road and operating crafts.

Historically, this classification of rail employees into groups by the Interstate Commerce Commission follows the long established rail practice of listing or referring to non-operating employees as one group and the operating crafts as another group. Group V in the Interstate Commerce Commission classification designates employees engaged in "transportation (other than train, engine and yard)." As stated by the Interstate Commerce Commission in its Report to Congress on December 13, 1932, Group V comprises "employees in transportation service *not directly connected with yard operation or the running of trains and engines.*"[10]

Group VI of the Interstate Commerce Commission classification comprises the rail transportation operating crafts whose work is directly connected with yard operation or the running of trains and engines. Under Group VI the Interstate Commerce Commission, since April 18, 1921, has grouped yardmasters, switchtenders, hostlers, yard conductors, yard brakemen, yard engineers, yard firemen, as well as the operating employees in road service. Undoubtedly this alignment of operating employees was well known to Congress at the time of the consideration of the 1934 amendments to the Railway Labor Act.[11]

In defining the jurisdiction of the First Division of the

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[9] The order of the Interstate Commerce Commission dated April 18, 1921, and also the order of October 20, 1932, supplementary thereto, were annuled by the Interstate Commerce Commission by an order effective August 1, 1940. This new order of the Interstate Commerce Commission consolidated, with minor revisions, the orders of April 18, 1921, and October 20, 1932, and did not change the classification of yardmasters with road and yard operating crafts.

[10] *Effect of Principle of 8-hour Day in the Employment of All Classes of Railway Employees*, Ex Parte No. 106, House of Representatives Document No. 496, at page 23. Library of Congress, Washington, D. C.

[11] *Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives*, 73rd Congress, Second Session on H. R. 7650, at page 65; also in the Report to Congress by the Interstate Commerce Commission in Ex Parte No. 106, House of Representatives Document No. 496, dated December 13, 1932, the Interstate Commerce Commission classification of railway employees is set forth in detail at pages 35-37.

Adjustment Board over disputes involving train and yard service employees, Congress intended to encompass employees customarily referred to as the rail "operating" group. As noted above train, engine and yard service employees are ordinarily referred to as the operating group. For example, in the Eleventh Annual Report of the National Mediation Board, the Board stated:[12]

> "As in several years past, the train, engine, and yard service employees, commonly known as the 'operating' group, accounted during 1945 for the largest number of representation cases handled during the year * * *."

For many years yardmasters, who are in charge of yard work and whose preponderant duties are concerned with yard operation and the direction and supervision of switching movements within the yard (R. 162-168, 193, 75-78) and who are ordinarily promoted from, or demoted to, the yard train and engine crafts (R. 203, 212) have been grouped and referred to as operating employees in yard service.

Respondents concede that "*yardmasters are properly included among the operating employees,*"[13] but curiously enough respondents contend that yardmasters are not in yard service. Obviously all *operating* employees are either in *road* service or *yard* service and not in any other service. Yardmasters are not in road service so must be included among the yard operating employees.

The following excerpt from the Report to the President by the Emergency Board appointed May 31, 1943, pursuant to the Railway Labor Act, illustrates the common understanding of authorities in the rail industry:[14]

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[12] *Eleventh Annual Report of The National Mediation Board Including the Report of the National Railroad Adjustment Board* (for the Fiscal Year Ended June 30, 1945) at page 18. See also Tenth Annual Report at page 21.

[13] Brief of Respondents in Opposition to the Petition for Certiorari at page 14.

[14] *Report to the President by the Emergency Board, appointed May 31, 1943, Pursuant to the Railway Labor Act and Executive Orders 9172 and 9299.* (Report dated September 25, 1943, by Emergency Board composed of Walter P. Stacy, I. L. Scharfman and Frank M. Swacker.) Library of Congress, Washington, D. C.

"The railroad workers involved in this dispute are *train and engine and yard service employees* who, for the most part, are engaged in the actual movement of freight and passenger trains. They are frequently referred to as transportation employees or '*operating employees*,' in contrast to the '*non-operating employees*' who maintain railroad tracks and equipment, handle freight shipments and sell passenger tickets, and perform a multitude of other duties necessary in the transportation of freight and passengers by rail.

"Out of a total of approximately 1,350,000 workers on the payrolls of Class I carriers in May 1943, about 315,000 were operating employees whose proposals for a general wage increase are before this Board.

"Most *operating employees* are engaged in '*road service*,' that is, in the performance of various duties required for the movement of freight and passenger trains from one locality to another. A substantial number of railroad workers, however, are employed in '*yard service*.' The duties of this group include the making up and the breaking up of trains in connection with the preparation for, or the culmination of, terminal to terminal runs. These employees, furthermore, handle the switching of cars for industries within terminal or yard limits, which involves the placing of loaded or empty cars on the tracks or sidings of factories and industrial concerns and the picking up of unloaded or loaded cars from these tracks, and they also interchange cars between connecting carriers.

"These are thus two types of work performed by this large group of employees — *road service*, which in turn is divided into freight and passenger service, *and yard service*. In May 1943 slightly more than 141,000 or 45 percent of the approximately 315,000 railroad transportation employees were engaged in such service. Nearly 44,000 employees or about 13 percent of the total were in passenger service, and approximately 130,000 or 42 percent were *employees in yard service*, including switch tenders, hostlers *and yardmasters*."

This Emergency Board was composed of Walter P. Stacy, I. L. Scharfman and Frank M. Swacker, all of whom have

sat as referees with divisions of the Adjustment Board and have frequently been appointed as members of Emergency Boards to hear wage disputes of rail employees. They were recognized as authorities in the field of rail employer-employee relations. It should also be observed that Mr. Frank M. Swacker who participated in the preparation of this report also sat as referee with the First Division in the decisions of Dockets Nos. 1198, 4503, 4504 and 4505, in which the contention was first made on March 1, 1938, by the carrier members of the First Division that yardmasters were not subject to the jurisdiction of that division.[15]

Further illustrating the uniformity of terminology among experts intimately associated with the rail industry, it will be noted that the Railroad Retirement Board in its Operating Manual for Field Offices,[16] in listing the crafts represented by the various rail brotherhoods includes therein the following reference:

> "Brotherhood of Railroad Trainmen * * * *in yard service . . . yardmasters, assistant yardmasters,* yard conductors, foremen, flagmen, switchtenders * * *."

Under the same title and heading, the jurisdiction of the Switchmen's Union of North America is stated as follows:

> "Switchmen's Union of North America. Persons *in switching service* as switchmen, switchtender, towerman, interlocking operators, car retarder operators *and yardmasters.*"

Under the alphabetical arrangement of railroad occupational titles and job descriptions on page 145 the term "yardmasters" is defined as follows:

> "Supervises the make up and break up of trains, and the handling of cars, locomotives, and trains within

[15] See page 33-34 of this brief.
[16] Library of Congress, Washington, D. C.

defined yard limits. Direct yard switch crews. Must pass examination based on book of rules."

Again in The Railway Labor Act and the National Mediation Board (1940)[17] the following statement is made at page 42:

> "It will be noted that employees *in the train and engine service occupations* are rather completely represented by national organizations. The notable *exception* to this statement *applies to yardmasters.* All 71 of the carriers considered the employees in this craft or class are without representation."

The Train Service Board of Adjustment for the Western Region, in Decision No. 2948, dated February 21, 1929 (R. 209, Plaintiffs' Exhibit J) sets forth a *joint* statement of the facts of the dispute as submitted *by the carrier and The Order of Railway Conductors* as follows:

> "Joint statement of Facts: *Prior to 1920* and subsequent thereto, E. J. McMartin, J. E. Elliott and H. T. Ireland were employed in the Chicago Freight Terminal *as yardmasters.* On or about January 1, 1927, they were permitted to give up these positions and displace conductors from positions in the Chicago switching district on the basis of their employment *in yard service prior to 1920.*"

The Director General of Railroads in General Order No. 27 with its supplements, addenda, amendments and interpretations issued on April 23, 1919, stated:[18]

> "Effective January 1, 1919, where there is no existing agreements or practice more favorable to employees, the wages of yard foremen *who also act as yardmasters*

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[17] Cited in *General Committee, etc. vs. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 330.

[18] General Order No. 27, together with its supplements and interpretations, is on file with the United States Railroad Administration Records in the National Archives, Washington, D. C.

(designated in some schedules as 'footboard' yardmasters) will be not less than 40c per day in excess of the yard foremen's rates. The same rules for the basic day and overtime shall apply to such employees as applies *to other yardmen.*"

Further illustrating the common understanding in the industry, we find in the Annual Report of the United States Board of Mediation to Congress for the year 1927 a report of the award of an arbitration board for an increase in wages of 60,000 conductors, trainmen and yardmen represented by the Order of Railway Conductors and the Brotherhood of Railroad Trainmen on railroads in Western territory and on page 46 the Board stated:[19]

> "The award further provides that all roads where trainmen legislate for *yardmasters* and *assistant yardmasters* the same increases will be added to present rates as were awarded to yard foremen. Trainmen were granted an increase in wages by this award. The increase *thus granted yardmen*, the award states, amounts to 7½%."

The foregoing references demonstrate beyond controversy the common recognition in the rail industry of yardmasters as yard service employees.

There is no dispute but that yard work refers to yard operation and the switching of trains in a railroad yard. Any employee engaged in yard operation and the movement of trains in a railroad yard is said to be in yard work or in yard service. The terms used are not mysterious to those outside the railroad industry and have been defined in the standard dictionaries. For instance, Webster's International Dictionary defines a "yard" as follows:

> "In railroad usage, the space or tract adjacent to a railway station or terminus, which is used for the

[19] Library of Congress, Washington, D. C.

switching or making up of trains, the accommodation of rolling stock, and similar purposes."

"Yardman" is defined as:

> "One who is employed in a railway yard under the yardmaster, to assist in switching cars and making up trains."

A "yardmaster" is defined as:

> "A man employed under the manager of a railway to superintend a terminal yard, whose duty it is to see to the proper switching and distribution of cars coming into the yard, and to the proper making up of trains to be sent out of the yard."

Similar definitions will be found in the Century Dictionary and Cyclopedia.

In the Dictionary of Occupational Titles issued by the United States Department of Labor the following definitions appear:

> "Yardmaster—(II) (RR Trans.) 0-98.73. supervise the make up and break up of trains, and the traffic of cars, locomotives, and trains within the railroad yard; issues written orders to train organizations; investigates complaints concerning poor freight service."
>
> "Conductor, yard (RR Trans.) 0-92.21. directs a switch engine crew in accordance with instructions of yardmasters II; signals engineer, and gives orders to switch engine crew in making up trains and shunting cars to the proper place in the yard."
>
> "Yard—a large clearing in the vicinity of a railroad station where trains are made up, cars are spotted and freight cars are stored on sidings."

The foregoing definitions of the yardmasters' duties are not essentially different from that given by the United

States Railroad Labor Board in Wage Series, Report No. 2, issued in May, 1921. At page 249 of the report of the United States Railroad Labor Board the yardmaster group is defined as follows:[20]

> "This group includes positions in which the preponderate duties of incumbents are to supervise or to assist in supervising the work of employees engaged in the making up, breaking up and movement of trains within a yard."

At page 257 of the same report the United States Railroad Labor Board describes the yard conductor and yard foremen group as follows:

> "The above class includes positions in which the duties of incumbents are to supervise and assist the work of switchmen and helpers in yard switching and yard work train service, including supervision of the making up and breaking up of train; and to perform related work."

At page 258 of Wage Series Report No. 2 the Railroad Labor Board describes yard brakemen, yard helpers and switchtenders as follows:

> "The above classes include positions in which the duties of incumbents are to couple, uncouple and ride cars in connection with the breaking up and making up of trains; to handle switches; and to perform related work in connection with yard switching or switch tending service."

At page 259 of the United States Railroad Labor Board Report the yard engineer and motorman group are defined:

> "The above classes include positions in which the duties of incumbents are to separate steam, electrical

[20] Library of Congress, Washington, D. C.

or other power used in yard switching and yard work train service; and to perform related work."

The United States Railroad Labor Board described the yard fireman and helper group (page 260) as follows:

> "The above class includes positions in which the duties of incumbents are to fire engines or assist motormen in operating electric locomotives used in yard switching and yard work trains service; and to perform related work."

The hostler group was defined by the United States Railroad Labor Board as follows:

> "The class 'outside hostler' includes positions in which the duties of incumbents are to handle locomotives between passenger stations and engine houses or yards or on main tracks, having unrestricted territory within yard limits; other than the operation of engines in yard switching service or road service.
>
> "The class 'outside hostler helper' includes positions in which the duties of incumbents are to assist outside hostlers in the handling of locomotives.
>
> "The class 'inside hostler' includes positions in which the duties of incumbents are to handle locomotives in and around engine houses, or on engine tracks at tie-up points, having restricted territory."

In accord with the foregoing definitions, the intervening defendant, Great Northern Railway Company, in its consolidated code of transportation rules and general instructions defines the duties of the yardmaster as follows (R. 167):

> "They have charge of yards, of the men employed, and handling of trains and the movement of cars therein."

The petitioners submit that the foregoing references re-

flect the uniform understanding of rail management, organizations representing employees, and government agencies intimately familiar with the rail industry that yardmasters are operating employees engaged in supervising the movement of trains and cars in railroad yards and customarily referred to as yard service employees. It is inconceivable that Congress could have intended that yardmasters be not regarded as in yard work or "yard service" and that this group of operating employees should be excluded from the designation of the operating groups of "train and yard service employees" in Section 3, First (h) of the Railway Labor Act.

IV

CONGRESS HAS TWICE REFUSED TO AMEND THE RAILWAY LABOR ACT SO AS TO EXCLUDE YARDMASTER DISPUTES FROM THE JURISDICTION OF THE FIRST DIVISION

In *1940* and again in *1941* in the 76th and 77th Congress, bills were introduced at the request of the American Shortline Railroad Association which contained the following provision:

> "The First Division of the Adjustment Board shall have jurisdiction over disputes involving train- and yard-service employees of carriers, including engineers, firemen, hostlers, outside hostler helpers, conductors, trainmen and yard-service employees, *except yardmasters and other subordinate officers.*"

In both sessions of Congress the Senate Committee on Interstate Commerce rejected these proposed amendments to the Railway Labor Act (R. 169, 170).

In commenting on a similar failure to obtain a legislative amendment, this court in *Federal Trade Commission vs. Bunte Bros.*, 312 U. S. 349, said:

> "This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's *unsuccessful attempt* in 1935 to secure from Congress an express grant of authority * * *"

The judgment of the trial court, affirmed on appeal by the Circuit Court, does what Congress refused to do by legislation. As this court said in *Western Union Telegraph Co. vs. Linroot*, 323 U. S. 490:

> "To translate this Act by process of interpretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation."

As to the proposed amendments, the Circuit Court said (R. 278):

> "Both bills went to the committee and were never reported out. Whether their demise by that method was due to the fact that the committee thought they were undesirable or unnecessary, we are not informed, and no presumption arises as to the cause."

It is significant that the American Short Line Railroad Association, composed of more than three hundred railroads, thought that these amendments were necessary to except and exclude yardmasters from the general designation of "yard-service employees," and the submission of the amendments reflected the view of the Short Line Railroads as to their interpretation of the term. Obviously, this fact, coupled with Congressional inaction on the proposed amendments, reinforces the contention of the petitioners as to Congressional intent and the Circuit Court erred in dismissing it as *entirely irrelevant*.

V

THE RAILWAY LABOR ACT HAS BEEN GIVEN AN INTERPRETATION CONTRARY TO THE AIM AND NATURE OF THE LEGISLATION

The primary object of all statutory interpretation is to ascertain and give effect to the intention of the legislature. In determining this intention the first and fundamental source is the words of the statute itself. These principles were stated by this court in *Federal Trade Commission vs. Bunte Bros.*, 312 U. S. 349, 351 as follows:

> "* * * * The construction of every statute presents an unique problem in which words derive vitality from the aim and nature of the specific legislation."

The aim and purpose of Congress in the enactment of the amendments to the Railway Labor Act in 1934 is apparent from the structure of the Act. In creating the National Railroad Adjustment Board the prime object of Congress was to create a board representative of both carriers and employees, composed of men trained and experienced in the intricate rules of employees in the transportation crafts.

With this object in view, Congress separated the Adjustment Board into four independent divisions and, as nearly as possible, grouped under the jurisdiction of each division the crafts of employees *in related lines of work.* The first three divisions are given jurisdiction over disputes of employees of carriers engaged in transportation *by rail*, and the Fourth Division is given jurisdiction over the disputes of employees of carriers engaged in transportation *by water.* The members of the first three divisions of the Adjustment Board are representative of rail labor organizations and of rail carriers. The members of the Fourth

Division of the Board are representative of three standard maritime labor unions and of carriers directly or indirectly engaged in marine transportation.

The First Division is given jurisdiction over the disputes of employees in the *operating* group, or the train and yard service employees. The shop craft employees, represented by shop craft unions, were placed under the jurisdiction of the Second Division. The Third Division was given jurisdiction over a miscellaneous group of rail crafts.

In giving the Fourth Division jurisdiction over marine employees and a "catch-all" jurisdiction, Congress evidently intended to provide for certain unorganized crafts, relatively few in number, such as special agents, patrolmen, lieutenants and sergeants of police, night watchmen, stock claim agents, train porters, grain elevator employees, bus and truck drivers, crossing tenders, gatemen, stockyard employees, and chair car attendants.[1]

The petitioners submit that the general scheme and design of the Railway Labor Act, particularly the provisions of Section 3, should have impelled the conclusion that jurisdiction over yardmaster disputes lay in the First Division. The very purpose of the Act was to achieve an administrative forum composed of men informed by long training and experience in the technical problems of the particular craft disputes submitted to them. It requires a most violent assumption as to Congressional purpose, unsupported by any convincing proof and contrary to every available aid to Congressional purpose, to conclude that Congress intended that yardmasters should submit their disputes to a Board representative of carriers directly or indirectly engaged in transportation by water and labor organizations representative of marine employees.

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[1] See miscellaneous groups listed in Table XIV of the *Eleventh Annual Report of the National Mediation Board* (for the Fiscal Year Ended June 30, 1945); see also the Annual Reports and the Awards of the Fourth Division of the Adjustment Board.

VI

THE CIRCUIT COURT ERRED IN HOLDING ITSELF BOUND BY THE FINDINGS OF THE DISTRICT COURT

The fundamental error of the lower courts lies in the attempt to apply the rule stated by this court in *O'Hara vs. Luckenbach S. S. Co.*, 269 U. S. 364. In that case this court quoted with approval from *Unwin vs. Hanson* (1891) 2 Q. B. 115, 119, as follows:

> "If the Act is one passed with reference to a particular trade, business or transaction, and words are used which *everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.*"

It will be observed that the rule in *O'Hara vs. Luckenbach* is applicable only where it is shown that technical words have acquired a particular meaning *universally so understood by everybody conversant in the trade.* In the Luckenbach case this court determined the technical meaning of the nautical term "divided into watches" by reference to a marine encyclopedia and a dictionary of sea terms. Obviously, to establish that a trade term has acquired a particular technical meaning, the evidence must be clear, convincing and uncontradicted. In such a case the rule is a relevant aid in statutory construction. But even then the rule is not applied to the exclusion of other relevant aids to Congressional intent. *O'Hara vs. Luckenbach*, 269 U. S. 364; *MacEvoy vs. U. S.*, 322 U. S. 102, 108; *Massachusetts Protective Asso. vs. U. S.*, 114 F. 2d. 304; *General Petroleum Corp. vs. U. S.*, 24 F. Supp. 285.

In this case the District Court attempted to "find" the universal and commonly accepted "railroad usage" of the

terms "yard service" and "yard service employees" from *conflicting* oral evidence. The District Court concluded that the "preponderance" of the evidence was in favor of respondents. The Circuit Court concluded that the oral evidence constituted "substantial evidence" in support of the findings and that it was "bound" by them.

The Circuit Court was, of course, in no sense "bound" by the findings of the District Court. *Bogardus vs. Commissioner of Internal Revenue*, 302 U. S. 34; *U. S. vs. Anderson*, 7th Circuit, 108 F. 2d. 475; *U. S. vs. Armature Rewinding Co.*, 8th Circuit, 124 F. 2d. 589. The rule has been stated by the Seventh Circuit in *U. S. vs. Anderson*, supra, to be:

> "*The problem is one of construction*, one of application of the taxing statute. In such situations, the findings of the trial court, while worthy of great consideration, are not conclusive, cf. Federal Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c; and, where the ultimate finding is a conclusion of law, or at least a determination of a mixed question of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court, *Bogardus vs. Commissioner*, 302 U. S. 34, 39, 58 S. Ct. 61, 82 L. Ed. 34."

Aside from the fact that the oral testimony of the three witnesses for the respondents does not support the findings of a universal and commonly accepted trade usage of the term "yard service employees" as exclusive of the yardmaster craft, such a finding is manifestly erroneous and impossible in the face of conclusive documentary evidence to the contrary.[1] At the very least, the use of the term "yard service employees" by the National Railroad Adjustment Board and the National Mediation Board in reports to Congress and by other rail experts in official doc-

[1] See authorities cited in Division III of this brief.

uments reflects such a common and universal understanding of the term in the industry as to preclude entirely a finding based on the testimony of interested witnesses that the term has been universally understood as descriptive of only certain crafts exclusive of other yard crafts.[1]

Petitioners submit that the District Court erred in purporting to find a universal and accepted use of the term "yard service employees" as exclusive of yardmasters on the basis of conflicting oral testimony and contrary to conclusive documentary evidence. It is further submitted that the Circuit Court in asserting itself "bound" by the findings of the District Court precluded itself from exercising its judicial function of statutory interpretation.

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[1] See also footnote 23 on page 23 of this brief.

CONCLUSION

Seldom has the intent of Congress more plainly appeared from a consideration of relevant aids to Congressional purpose. The decisions below destroy the fundamental purpose of Congress in creating the National Railroad Adjustment Board as a tribunal of experts in the disputes submitted to it. It creates jurisdictional distinctions which must inevitably foster future conflict in the work of the Board and hamper it in the exercise of its functions.

The petitioners submit that the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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October, 1946

APPENDIX

Excerpts from Act of May 20, 1926, as amended by Act of June 21, 1934, *45 U. S. C., Sec. 151*, et seq.

Section 1, Fifth, of the Railway Labor Act provides as follows:

> "Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission."

Section 3, First (h) of the Railway Labor Act provides as follows:

> "(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:
>
> "First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and desig-

nated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

APPENDIX II

The First Division of the National Railroad Adjustment Board is composed of five representatives of the rail carriers and five representatives of the following national rail employee organizations:

Brotherhood of Locomotive Engineers

Brotherhood of Locomotive Firemen & Enginemen

Order of Railway Conductors of America

Brotherhood of Railroad Trainmen
Switchmen's Union of North America

The Fourth Division of the National Railroad Adjustment Board is composed of three representatives of carriers directly or indirectly engaged in transportation by water and three representatives of the following national marine employee organizations:

International Longshoremen's Association
National Marine Engineers' Beneficial Association
Inlandboatmen's Union of the Pacific

APPENDIX III

Award No. 2710
Docket No. 1198

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

The First Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS
BROTHERHOOD OF RAILROAD TRAINMEN
THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of R. D. Griffin for one day's pay each date since January 1, 1932, account of being displaced off the night yardmaster's job, which he bid in and was assigned to under settlement of December 14, 1929, and improperly displaced by Assistant Yardmaster Roy Davis who failed to bid on the job when bulletined

February 10, 1929. Articles 14 (a) and (f), Yard Schedule, and Decisions 361, 362 and 597, Train Service Board of Adjustment for the Western Region.

JOINT STATEMENT OF FACTS: Mr. R. D. Griffin was awarded the position of Night Yardmaster in Salt Lake City Yard under bulletin, dated Feb. 10, 1929, being the only applicant for the position. Jan. 1, 1932, the position of Assistant Yardmaster with assignment from 7 A.M. to 3 P.M., held by Roy Davis, was abolished and he was permitted to displace Night Yardmaster Griffin.

Claim was made that inasmuch as Assistant Yardmaster Davis failed to bid on the night yardmaster vacancy of Feb. 10, 1929, he should not be permitted to exercise seniority in that position.

Claim in this case is for $9.66 per day at night yardmaster's rate of pay in Salt Lake City.

Both parties desire oral hearing in this case.

POSITION OF EMPLOYEES: The Organization contends that Article 14, Paragraphs (a) and (f), of the Yardmen's schedule reading as follows:

> "(a) Seniority rights of yardmen will date from the day they first perform service in the yard where employed. The right to preference of work and promotion will be governed by seniority, capability to be considered."

> "(f) When a permanent vacancy occurs or a new position is created, a bulletin will be posted for a period of 24 hours and yardmen desiring same will so indicate in writing and a senior man applying will be assigned."

were violated, and also that Decisions 361, 362 and 597 of the Train Service Board of Adjustment for the Western Region support the claim.

Seniority and preference of work in filling the position of Assistant Night Yardmaster have been governed by the senior qualified man making application assigned. A yard-

man failing to bid on such position forfeits his right to the successful applicant, as shown in decisions of the Train Service Board of Adjustment for the Western Region, referred to in the submission. The decisions should apply the same to individuals failing to bid from Assistant Yardmaster to Night Yardmaster, as it would in failing to bid from Helper or Foreman to Assistant Yardmaster, and this case is the first time there is any record of an Assistant Yardmaster being permitted, after failing to bid on a Night Yardmaster position, to later be permitted to displace a man from the position secured by bid.

In 1928, the Night Yardmaster's position was bulletined and filled first by Yardmaster Smith, and again during this same year by bid by Assistant Yardmaster Criswell. Was again bulletined on or about January 2, 1929, awarded to former Yardmaster Mayfield, who had previously forfeited his rights in April, 1928, by giving up the position of Yardmaster and returned to service as Engine Foreman. Protest was made by Yardmaster Griffin to the assignment of Mayfield, January 2, 1929, and the case handled by the Organization with the Carrier, and settlement reached with the Vice Presidents of the Conductors and Trainmen Dec. 14, 1929, agreeing to place Yardmaster Griffin in the vacancy and pay him the difference in the amount earned as Assistant Yardmaster and what he would have earned as Night Yardmaster.

During this entire period Mr. Roy Davis was filling the position of Assistant Yardmaster and failed to bid on the night job. The Assistant Yardmaster's job he was holding was not abolished. The hours were changed covering his assignment 7:00 A.M. to 3:00 P.M. to 6:00 A.M. to 2:00 P.M.

POSITION OF CARRIER: R. D. Griffin was awarded the position of night yardmaster at Salt Lake under Bulletin No. 28 of Feb. 10, 1929. Mr. Griffin's seniority date as a yardmaster is that of Sept. 22, 1926. At this time Roy Davis was holding a position as assistant yardmaster at

30th South St. on the 7 A.M. to 3 P.M. shift. His seniority date as yardmaster is April 5, 1923, As assistant yardmaster, commencing work at 7 A.M., Mr. Davis was available for use to fill temporary vacancies caused by the General Yardmaster being off and he was so used. Mr. Davis, no doubt, considered the day assignment as assistant yardmaster preferable to that of nights, therefore, did not bid on Bulletin 28 of Feb. 10, 1929, for the night yardmaster position. On or about Jan. 1, 1932, the position of assistant yardmaster at 30th South St., 6 A.M. to 2 P.M. Shift, was abolished and Roy Davis, displaced in this reduction of force, exercised his seniority and displaced Mr. Griffin, a junior man holding position of night yardmaster.

On Nov. 25, 1932, as a matter of discipline, Mr .Davis was demoted from the position of Night Yardmaster to the ranks of a switchman. L. H. Criswell, senior to Griffin as a yardmaster, bid in and was assigned the night yardmaster position. The demotion of Roy Davis as a yardmaster was handled by the Employees as a grievance, and as a result his seniority rights as a yardmaster were restored July 7, 1933. Thereupon, Mr. Davis was again placed in the night yardmaster position, and L. H. Criswell was placed as an assistant yardmaster, R. D. Griffin was placed as assistant yardmaster on or about the date Mr. Davis was demoted. When Mr. Davis' seniority rights as a yardmaster were restored he was again returned to that position on or about July 15, 1933, which again set Mr. Griffin back to the extra board as a yardmaster. On August 21, 1933, an additional assistant yardmaster position at 30th South Street was established and Mr. Griffin was placed in that position.

At the present time M. E. Gilson is General Yardmaster, Roy Davis is Night Yardmaster, and H. F. Stubbs is Assistant Yardmaster at 6th South St. 7:30 A.M. to 3:30 P.M. L. H. Criswell is Assistant Yardmaster 30th South, 1 P.M. to 9 P.M., and R. D. Griffin is Assistant Yardmaster, 30th South St., 9 P.M. to 5 A.M. The seniority list of yardmasters at Salt Lake, Jan. 1, 1932, was as follows:

Gilson, M. E.	3-15-1921
Stubbs, H. F.	8- 5-1922
Davis, Roy	4- 5-1923
Criswell, L. H.	6-13-1925
Griffin, R. D.	9-22-1926
Crostick, R. J.	7-17-1928
Middleton, C. A.	10-17-1928
McNeill, E. S.	5- 5-1929
McPheeters, H. E.	5- 1-1930

The Carrier contends that an assistant yardmaster does not forfeit his yardmaster seniority rights because when holding a position as such during the daytime he does not bid on a vacancy as night yardmaster. Reference is made by the Employees to decisions 361, 362 and 597 of the Western Train Service Board of Adjustment as supporting this claim. The Carrier contends these decisions do not support the claim, but on the contrary, they do support the position of the Carrier, in that it was the position of the Carrier in those cases that seniority as yardmasters prevailed, and that senior yardmen who had not established a date as yardmasters were not entitled to displace such employees, although they may have been junior as switchmen.

During the period involved in this claim Mr. Griffin was employed in various capacities in yard service at Salt Lake City.

FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

An assistant yardmaster does not forfeit his yardmaster

seniority rights because when holding a position as such during the daytime he does not bid on a vacancy as night yardmaster. In the instant case day assistant yardmaster job held by Roy Davis was abolished, Griffin being his junior on night yardmaster job, Davis was entitled to displace Griffin.

AWARD.

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

ATTEST: (Sgd) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 31st day of March, 1938.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 63

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. Fraser, *et al.*, *Petitioners.*

vs.

O. E. SWAN, *et al.*, *Respondents.*

No. 64

F. J. WILLIAMS, *et al.*, *Petitioners.*

vs.

O. E. SWAN, *et al.*, *Respondents.*

REPLY BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 63 and 64

The Order of Railway Conductors of America, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and Brotherhood of Railroad Trainmen, A. F. Whitney, President and S. R. Harvey, Assistant President, *Petitioners.*

v.

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox, *Respondents.* Railroad Yardmasters of America, Great Northern Railway Company and Southern Pacific Company, *Intervenor-Respondents.*

F. J. Williams, William Bishop, Paul M. Carter, M. J. Leach, and Fred Lewis, Individually, and as Members of The National Railroad Adjustment Board, *Petitioners.*

v.

O. E. Swan, T. K. Faherty, R. A. Knoff, L. L. McDonald, L. O. Murdock, H. J. Reeser, J. W. Cox, E. W. Fowler, R. A. Walton, W. O. Holmes and J. M. Fox, *Respondents.* Railroad Yardmasters of America, Great Northern Railway Company and Southern Pacific Company, *Intervenor-Respondents.*

REPLY BRIEF FOR PETITIONERS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

FOREWORD

The argument of the carrier respondents is interlaced with numerous statements unsupported by the record or entirely irrelevant to the issue before the court. The record and the exhibits will demonstrate this fact and only a few need be noted.

At the outset the carrier respondents say:

> "This is primarily a contest between rival labor organizations whose memberships include yardmasters." (Respondents' Brief Pg. 4.)

This statement, labored for four pages, is entirely unwarranted and is not supported by the record. Since July 11, 1938, the intervenor, Railroad Yardmasters of America, has submitted yardmaster disputes to the Fourth Division. While unauthorized, this procedure was immaterial to petitioners so long as it was confined to members of the Railroad Yardmasters of America and cases in which petitioners had no interest. However, when the carrier members of the First Division on August 28, 1941 (R. 186-188), refused to set yardmaster disputes submitted by petitioners for hearing, the petitioners were compelled to bring this action against the Adjustment Board or forfeit the statutory rights of yardmasters represented by them.

Respondents, again seeking to emphasize extraneous matters, stress the lack of the representation of the Railroad Yardmasters of America on the First Division. What conceivable relevance does this have to the issue of statutory interpretation? The congressional hearings on the 1934 amendments to the Railway Labor Act reflect that Congress was well aware that numerous labor organizations would not be represented on the several divisions of the Adjustment Board. This cynical commentary by the carriers on the work of the Adjustment Board, and its utter irrele-

vance, indicates the lengths to which respondents are driven in an attempt to support the decision below.

REPLY ARGUMENT

I.

In their argument (P. 12), the carrier respondents state that:

> "The statute does not refer to yardmasters by name in the designation of crafts of employees whose disputes are embraced in the jurisdiction of the First Division."

Neither does the statute refer *by name* to numerous other road and yard crafts whose disputes are properly submitted to the First Division under the general designation of crafts within the jurisdiction of that division. For the convenience of the court, we list in parallel columns the statutory designation and the crafts over whose disputes the First Division has assumed jurisdiction.[1]

STATUTORY DESIGNATION	CRAFTS INCLUDED IN FIRST DIVISION
Train and Yard Service Employees	Engineers and Helper Engineers
Engineers	Firemen
Firemen	Conductors
Hostlers and Outside Hostler Helpers	Ticket Collectors
Conductors	Pilots
Trainmen	Brakemen
Yard Service Employees	Flagmen
	Baggagemen
	Yardmasters

[1] See Published Awards of the First Division of the National Railroad Adjustment Board and Index thereto, Library of Congress, Washington, D. C., and page 23, Footnote 23, of Petitioners' Brief.

Yard Conductors and Yard Foremen
Outside Hostlers
Inside Hostlers
Yard Helpers
Car Retarder Operators
Switchtenders
Engine Herders

Yardmasters are a separate and distinct craft of rail employees; so are yard foremen; so are switchtenders; so are hostlers and other yard crafts. There are not "two" crafts — yardmasters and "yard-service employees" — as respondents assert at page 48 of their brief, but numerous separate yard crafts employed in yard service. By reason of schedule agreements, each of these crafts have distinct duties and the carriers are precluded from causing one craft to impinge on the work of another craft in violation of their agreements.

The basic effort of respondents is an attempt to distinguish yardmasters from other yard crafts on the ground that they are officials — not "employees." The inherent obstacle to this argument is that the Interstate Commerce Commission has defined them as "subordinate officials"[2] and Section 1, Fifth, of the Railway Labor Act defines the term "employee" to include subordinate officials.

In view of the statutory definition of "employees," of what aid to a solution of the problem before this court is it to assert that "yardmasters are an independent craft" (with which we agree) and that "the essential distinction" between yardmasters and yard service employees is "in terms of the supervisory service performed by the first and the yard service performed by the second"? (Pg. 25 of carrier respondents' brief.) The so-called distinction in nowise demonstrates that yardmasters are not in yard service merely because they are supervisory employees. It may as

[2] Ex Parte 72, R. 201, Intervenor's Exhibit No. 5).

well be argued that a passenger conductor is not in "road service" simply because he has supervision over the fireman, the engineer and the brakeman; or that the yard conductor is not in "yard service" simply because he directs and supervises the switch engine crew.[3]

It is fruitless to attempt to distinguish the jurisdiction of the several divisions of the Adjustment Board over "employees of carriers" by attempting to distinguish "employees" who have supervisory duties and those who do not have supervisory duties. The argument arrives nowhere.

The significant point in the carrier respondents' brief is that it does not deny the petitioners' contention that yard work or yard service refers to *yard operation and the switching of trains in a railroad yard* (Petitioners' brief pages 42-47). Nor do respondents deny that the preponderant duties of yardmasters are in yard operation and switching service. Nor do they deny that yardmasters are "operating employees."[4] Yardmasters work in a "yard," are operating "employees" engaged in yard operation and quite obviously, we submit, are "yard-service employees" within the clear wording of Section 3, First (h) of the Act.

It is these criteria that place an "employee" in "yard service" and not the circumstance whether his craft is an independent one, as are numerous other yard crafts, or whether his work is of a supervisory nature.

Under the title "Respondents' Documentary Evidence of the Meaning of the Railroad Term Embraced in the Statute," the carrier respondents quote excerpts from several submissions to the Adjustment Board (p. 20-24). These isolated examples of terminology in another context combed from literally thousands of submissions to the Adjust-

[3] See page 48 of Petitioners' Brief for definition of duties of yard conductors as contained in the *Dictionary of Occupational Titles* issued by the United States Department of Labor.

[4] In fact the carrier respondents concede on page 14 of the Brief of Respondents in opposition to the Petition for Certiorari that yardmasters are operating employees.

ment Board in nowise support the respondents' contention of an established trade use of the term "yard-service employees" as exclusive of yardmasters. Neither the trial court not the Circuit Court of Appeals deemed this evidence of sufficient weight even to mention it in support of their conclusions.

Apart from the numerous examples of the recognition in the trade that yardmasters are in yard service, referred to in petitioners' brief at pages 37-51, the conclusive answer is that the carriers themselves have repeatedly recognized the fact that yardmasters are in yard service in submissions to the First Division of the Adjustment Board. Only a few examples need be cited. In Award No. 1649 (R. 210, plaintiffs' Exhibit K), one McMartin complained of his demotion from the position of yardmaster and his dispute was submitted to the First Division. The Chicago & Northwestern Railway Company defended the claim *but raised no question concerning the jurisdiction of the First Division.* In Award No. 2710 (Appendix III, Petitioners Brief), the Denver and Rio Grande Western Railroad Company *joined with the organization* in submitting a yardmaster dispute to the First Division. Again in Award No. 2712 (R. 75) and in Award No. 2713 (R. 210; Plaintiffs' Exhibit K), the Denver and Rio Grande Western Railroad Company *joined with the organization* in submitting two yardmaster disputes to the First Division. In Award No. 1896 (R. 210, plaintiffs' Exhibit K), two yardmasters complained of wrongful displacement as yardmasters. The Chicago, Rock Island and Pacific Railway Company and the Chicago, Rock Island and Gulf Railway Company, while contending that the Adjustment Board was without jurisdiction because of the claim that the organization did not represent yardmasters, made no contention that yardmasters were not in yard service. *On the merits*, the carriers contended that yardmasters were officials. The First Division overruled the carriers' contention and sustained the claim. In this Award (No. 1896), dated April 14, 1937, the

carrier members of the First Division dissented from the conclusion of the majority *but raised no question that the First Division did not have jurisdiction of the dispute on the ground that yardmasters were not in yard service.* And in Award No. 4117 (R. 210, Plaintiffs' Exhibit K), the Southern Pacific Company defended a yardmaster dispute submitted to the First Division without any objection to the jurisdiction of that Division over yardmaster disputes.

The first instance of a carrier challenge to the jurisdiction of the First Division over yardmaster disputes occurred subsequent to the collusive decree in Chancery No. 16031 (R. 159).

It is of the greatest significance that the carriers, the labor organizations submitting yardmaster disputes to the First Division, and the carrier and labor representatives on the First Division did not question the jurisdiction of that Division over yardmaster disputes prior to 1938; and the First Division continued to decide yardmaster disputes after 1938 (See Award No. 4117 decided August 30, 1939 — R. 210, Plaintiffs' Exhibit K). Had there been any general and recognized usage in the industry, as respondents contend, that yardmasters were not in yard service, *is it conceivable* that the carriers themselves would not have immediately questioned the jurisdiction of the First Division to hear yardmaster disputes?

The sole evidence in this record to support the contention of respondents of a general recognized usage in the railroad industry that yardmasters are not yard service employees is the testimony of three interested witnesses at the trial of this case. The isolated excerpts from a few submissions to the Adjustment Board taken from an entirely different context in no sense support their contention. It is submitted that the carriers' contention is entirely refuted by the fact alone that the carriers *joined with the organizations* in submitting yardmaster disputes to the First Division, raised no question concerning the jurisdiction of that Division, and that it did not occur to the carrier representa-

tives on the First Division to raise the question prior to 1938. When the question was raised in 1938 by the carrier representatives, it is not an unreasonable inference to conclude that it was for reasons entirely different from any conviction that yardmasters were not in yard service.

At page 26 of their brief, the carrier respondents refer to excerpts from *Ex Parte No. 106*.[5] The short excerpts quoted may be misleading and we respectfully refer the court to the Commission's discussion of "Group V, Transportation (other than train, engine and yard)" in which the Commission stated:

> "This group comprises employees in transportation service not directly connected with yard operation or the running of trains and engines."[6]

Following the discussion of this group the Commission discusses the employees in transportation service under the heading "Group VI, Transportation — Train, Engine and Yard." In the discussion under Group VI, the Commission refers to yardmasters, clearly indicating that it regarded this group as among the yard transportation employees. The excerpt quoted by the carrier respondents has reference merely to certain yard crafts and is obviously not intended to be inclusive of all yard crafts or to indicate that yardmasters are not engaged in yard transportation service.

It is also of no significance that the United States Railroad Labor Board in 1921 classified yardmasters as in supervisory service. This in no way excludes their employment in yard service. Yard service or yard work encompasses all employees whose preponderant duties are concerned with *yard operation and the movements of trains and engines in the yard*.

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[5] House of Representatives Document No. 496, Library of Congress, Washington, D. C.

[6] Emphasis in this brief is added unless otherwise indicated.

II.

At page 36 of their brief, the carrier respondents contend that the historical background of the Railroad Adjustment Board should not be considered in determining the jurisdiction of the First Division. The point that respondents are unable to answer, and therefore ignore, is that the 1934 amendments to the Railway Labor Act defined the jurisdiction of the First Division to conform to that of the four regional boards which had previously heard disputes of the operating employees. The First Division of the Adjustment Board in its First Annual Report to Congress stated:

> "The First Division of the National Railroad Adjustment Board *took over the work of the four regional boards* * * *."

The work of the four regional boards included decisions of many yardmaster disputes (See Record 207-209, Plaintiffs' Exhibits D, F, G, H, I & J). The First Division in fact took over the work of the four regional boards *including yardmaster disputes* (R. 210, Plaintiffs' Exhibit K; R. 37, 52, 75, Exhibits E, F & G; Award 2710, Appendix III of Petitioners' Brief).

In an attempt to refute the force of the historical background of the yardmaster disputes before the Adjustment Board, the carrier respondents say:

> "Large numbers of yard service employees, such as those belonging to the Switchmen's Union of North America, were not subject to the jurisdiction of the train service boards of adjustment, and only the comparatively few yardmasters belonging to the signatory organizations were subject to that jurisdiction." (P. 47-48.)

The assertion of respondents, above quoted, that few yardmasters belonged to the train service organizations

(which include petitioners) prior to 1934 is without foundation in this record. Also, the carrier respondents' statement on pages 8 and 9 of their brief that "petitioners' representation of yardmasters prior to 1934 was insignificant" has no support in the record. These statements, and similar ones that occur throughout the respondents' brief, are made without citation of authority or reference to the record. The only showing in the record as to the relative representation of yardmasters by rail employee organizations is that of July 8, 1942, the date on which the stipulation was executed (R. 162, 170). The record is barren of information as to the relative proportion of yardmasters represented by any labor organization prior to this date.

The fact that respondents have apparently felt compelled to resort to assertions unsupported by the record illustrate the weakness of their position. In one breath they seek to emphasize the relative labor affiliations of yardmasters, and in the next they say that the jurisdiction of the Adjustment Board is defined in terms of specified crafts "regardless of the labor affiliations of such employees." (P. 50, Carrier Respondents' Brief).

Possibly some yardmasters did not submit their disputes to the regional boards of adjustment in the period from 1921 to 1934, although the record leaves it a matter for speculation as to whether any large number of yardmasters were without representation before the regional boards. The record does show that the regional boards heard yardmaster disputes and that the First Division of the Adjustment Board took over the work of the regional boards, including yardmaster disputes, and heard and adjusted such claims until the present controversy arose. It is, therefore, difficult to understand the respondents' contention that the historical background of the Adjustment Board should be ignored entirely in determining the issue under consideration.

III.

In division 3 the carrier respondents assert that:

> "Any consideration of the administrative action of the (Adjustment) Board in this matter necessarily involves an examination of the action of its divisions, First and Fourth, because both have dealt with yardmaster disputes." (Pg. 53.)

The consideration of yardmaster disputes by the Fourth Division, however, has been under the compulsion of the collusive decree in Chancery No. 16031 issued July 11, 1938. *Prior to that date*, the Fourth Division was deadlocked.

As to the awards of the First Division, this court is respectfully referred to Petitioners' Exhibit K, Record 210, showing the awards of the First Division in yardmaster disputes. It is submitted that respondents are grasping at straws to attribute these awards to the oversight not only of the ten practical railroad men on the First Division but of the several carriers who participated in the submission of these cases to the First Division.

On page 9 of their brief, carrier respondents say:

> "The First Division has never discussed the jurisdictional question here involved, or made a ruling thereon, in any award rendered by it."

As to this statement, we respectfully refer this court to the discussion of Award Nos. 2710, 2711, 2712 and 2713 at pages 33-34 of petitioners' brief. The issue was discussed in the consideration of these awards and ruled on.

The respondents admit that some of these awards involve yardmasters but attempt to distinguish others as not involving the yardmaster's agreement. The purported distinction is without foundation. It is impossible for the First Division to rule on a claim to the yardmaster's position without also passing on the right of the yardmaster incumbent under yard schedules.

In actual practice, the agreement concerning rules and rates of pay governing yardmasters is included with the other yard crafts where yardmasters are represented by the train service organizations. This practice is illustrated by Decision No. 84 of the Train Service Board of Adjustment for the Western Region (R. 209, Plaintiffs' Exhibit J). In that decision the Order of Railway Conductors and the Brotherhood of Railroad Trainmen contended that:

> "Organizations contend that inasmuch as the rates of pay covering yardmasters and assistant yardmasters have heretofore been carried in Article 1, **Schedule of Pay for Yardmen**, effective December 1, 1917, and all previous yard schedules, that neither Supplement 16, 25 nor United States Labor Board Decision No. 2, eliminated them therefrom.
>
> Organizations further contend that such increases granted by the General Orders, etc., should be added to the rates in Article 1, covering yardmasters, and assistant yardmasters and continued in the Schedule."

In respect to the respondents' discussion on page 45 of Decision No. 2 of the United States Railroad Labor Board, the court is respectfully referred to the decision of the Western Train Service Board of Adjustment in Decision No. 84 quoted above in which the Board stated:

> "There is nothing in Supplements No. 16, 25, or Decision No. 2 of the United States Railroad Labor Board that eliminates yardmasters or assistant yardmasters' rates of pay from **the yardmen's schedule**; neither is the question of jurisdiction referred to in the Supplements or Decision No. 2.
>
> The Board therefore decides that the rates of pay of yardmasters and assistant yardmasters should be continued in the schedule."

The term "yardmen," while sometimes used to denote the men under the yardmaster, is also a general term often

used to designate all yard crafts including the yardmaster craft, as shown by the inclusion of rules governing yardmasters rates of pay in the "Yardmen's Schedule."

Also, as shown by Decision 84 of the Western Train Service Board quoted above, Decision No. 2 of the United States Railroad Labor Board did not exclude yardmasters as "yardmen." Furthermore Decision No. 2, cited by the carrier respondents (their brief p. 45), in which "Yardmasters and Assistant Yardmasters" were listed under the title of "other Supervisory Forces," was decided July 20, 1920. The decision of the Interstate Commerce Commission in Ex parte No. 72 holding yardmasters and assistant yardmasters "* * * excepting general yardmasters at large and important switching centers where of necessity such general yardmasters are vested with responsibilities and authority that stamp them as officials" to be "subordinate officials" and hence "employees" under the Railway Labor Act was decided Nov. 24, 1920, or three months later.

In Vol. III of the Decisions of the United States Railroad Labor Board, p. 1146, under the heading "Introduction to General Indices" is an explanatory statement of the Board for the "Table of Main Classifications" which follows. In this table is shown as a main classification "Yard Service p. 1181," and at p. 1181 of the Index to Decisions under the heading "Yard Service" are shown various crafts including "Yardmasters." At p. 1174 of the same Index to Decisions, under the main heading "Rate of Pay," appears a sub-heading "Schedule Rules—affecting pay" and under this appears a further sub-division "Yard Service Crews" under which is shown "Yardmasters—Decision 1411—p. 984."

We submit that the foregoing establishes without question that the United States Railway Labor Board regarded, treated and classified "Yardmasters" as one of the crafts in "yard service."

The respondents (carrier members brief p. 49, Railroad Yardmasters brief p. 29) quote from the testimony of

George M. Harrison in the hearings before the House Committee at the time of the 1934 amendments. His statements fortify petitioners' contention that "Yardmasters" are included in the general term "yard service employees" as used in the Act.

Respondents concede that:

(1) "Yardmasters are properly included among the operating employees" (Carrier brief in opposition to writ, P. 14), and

(2) "* * * That the work of a Yardmaster is more closely allied to that of the man engaged in train and engine service than it is with any other group or class of employees in the yard." (R. 193, 196 and 197.)

When Mr. Harrison made the statements before the House Committee which Respondents quote, i.e.:

> "Division 1 shall have jurisdiction over controversies affecting the train engine and *yard service employees*. That is, the switchmen and the engineers and the firemen and conductors, and the trainmen *and other related train service employees.*"

He quite naturally was referring generally to the operating group (which respondents concede to include yard-masters) engaged in the handling and movement of trains in road and yard service.

He used the term "switchmen" which craft is not mentioned *by name* in the Act. Yet the First Division hears disputes involving switchmen. He did not refer to "hostlers and outside hostler helpers" which crafts are those expressly named in the Act over which the First Division has jurisdiction.

The labor unions representing, generally, the operating groups are sometimes referred to as the "Train Service Organizations (engineers, firemen, hostlers, conductors, trainmen and yard service employees)." (Inquiry of the Attorney General Committee, National Railroad Adjustment Board compiled by Harry E. Jones, p. 81).

In the report of the Eight-Hour Commission to the President in December of 1917 reference was made to "train operation" and the report stated:

> "Turning to the second aspect of *train operation*—the kind of work involved—this also falls into two broad divisions, *yard and road service.*"[7]

In this same Eight-Hour Report under the title "Overtime in Yard Service," it is stated:

> "Yard service, it must be remembered, consists of a continuous succession of pieces of work—the classification, shifting and re-assembling of cars. None of these tasks can be stopped arbitrarily * * * The *Yardmaster*, perhaps, in the late afternoon, thinking his yard well cleaned up, is advised of the arrival of heavy trains of perishable freight, livestock and the like. The yard must be cleared at any cost."[8]

The respondent carrier members assert (their brief p. 46) that it was only after October 13, 1922, the date of Decision 1266 of the United States Railway Labor Board, that there were "standard rules" governing working conditions of Yardmasters. Decision No. 84 Case No. 96 of the Western Train Service Board (Plaintiffs' Exhibit J, R. 209) shows that "rates of pay covering Yardmasters and Assistant Yardmasters have heretofore been carried in Article 1, Schedule of Pay for Yardmen, effective December 1, 1917, and all *previous yard schedules*, [and] that neither Supplements, 16, 25, nor United States Labor Board Decision No. 2, eliminated them therefrom." The claim was sustained. See also Decision No. 846, Case No. 662 (R. 209, Plaintiffs' Exhibit J) and awards No. 2490 and 2491 which indicate that yardmasters were represented by petitioners as early as 1906. (R. 210, Plaintiffs' Exhibit K).

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[7] The Report of the Eight-Hour Commission set out in Appendix VII "*Employment Conditions in Train and Yard Service under the Eight-Hour Law*," by Victor S. Clark, Ph.D., p. 383.

[8] "*Railway Schedules and Agreements*," by William Q. Ripley, Ph.D., at page 298, Appendix VI, Report of Eight Hour Commission.

The carriers had, prior to the decision in Ex parte 72, decided November 24, 1920, resisted the growing unionization of yardmasters on the ground they were "supervisory officials", but as shown above, yardmasters had had representation rights prior to 1920.

Respondents seek to place an unwarranted emphasis upon an isolated excerpt from the testimony of petitioners' witness Nemitz. They quote (Carriers Brief p. 20):

> "Q. * * * Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance 'yard service employees' and 'Yardmen' and 'Yard crews' *generally speaking* mean the same thing?
>
> "A. Yes, sir."

This witness had served on the Train Service Board of Adjustment for the Western Region. This is the same Board shown by the cases cited supra from Plaintiffs' Exhibit J (R. 209) that had considered contracts covering Yardmasters in the schedule for yardmen. He was "speaking generally". He was the same witness who later in the same cross examination said that in his opinion Yardmasters and Assistant Yardmasters were included in the term Yardmen (R. 212-213).

The carriers have recognized the term "yardmen" as a general term frequently used to embrace all yard crafts including yardmasters, and as noted at page 12 of this brief it is common practice to include the rules governing yardmasters under the "Schedule of Pay for Yardmen." (R. 209, Plaintiffs' Exhibit J.) Further recognition by the carriers that yardmasters are employed in yard work will be observed in Award No. 4117 (R. 210, Plaintiffs' Exhibit K) wherein the carrier, Southern Pacific Company, stated:

> "On November 20, 1924, when the unification of the switching facilities at El Paso was placed in effect, **assistant yardmasters** employed by Southern Pacific (Pacific lines) at El Paso were the only yardmasters represented by an organization, and that only to the extent shown in Section (c), Article 1, and Article 18,

> **Yard Agreement**, former E. P. & S. W. Railroad (now a part of the Southern Pacific (Pacific lines)) * * *."

The First Division of the Adjustment Board has also recognized Yardmasters as "Yardmen" (R. 210 Plaintiffs' Ex. K, awards 2490 and 2491). In award No. 2491 the *joint* submission of the Brotherhood of Railroad Trainmen and the Denver and Rio Grande Western Railroad Company reads in part as follows:

> "E. J. Egger . . . claimed the difference in pay of Engine Foreman and General Yardmaster for the reason the position of **general yardmaster** was not bulletined as provided in Article 14(f), and filed under the provisions of 14(a) of the **Yardmen's schedule.**"

In its award in No. 2491 the First Division of the Adjustment Board on January 17, 1938, stated in part as follows:

> "It being shown that position of general **yardmaster** at Grand Junction is included within the scope of agreement between the parties governing wages and working conditions of **yardmen** in the employ of respondent carrier, it is held that when said position became vacant September 7, 1936, it should have been bulletined per Article 14(f) cited in said Agreement."

Respondent Railroad Yardmasters of America contends that Yardmasters belong in the "miscellaneous group" (their brief p. 29). They have never been so grouped in any of the annual reports of the National Mediation Board. On the contrary, in the tables listing agreements between carriers and the unions representing the different crafts, they have been listed either under the general designation "Yard Service Employees" or, commencing with the Fourth Annual Report for the year ending July 30, 1938, under the specific heading "yardmasters" in column six. The "miscellaneous group" has followed the marine crafts in column twenty-four.

A reference to the specific crafts listed in the Interstate Commerce Commission Order of April 18, 1921, under the

heading "VI-a—Transportation (Yardmasters, Switchtenders and Hostlers)" shows the following divisions by "Division Number":

"126. Yardmasters and Assistants.
127. Switch Tenders.
128. Outside Hostlers.
129. Inside Hostlers.
130. Outside Hostler Helpers."

Division "VI-b—Transportation (Train and Engine Service)" includes reporting numbers 131 to 148 showing road conductors, freight conductors, firemen, and others. A comparison with the Official Index Digest to the Awards of the First Division of the Adjustment Board will show that the First Division has heard and decided disputes involving each and all the transportation operating crafts listed by the Interstate Commerce Commission under the titles in divisions VI-a and VI-b above set forth, including yardmasters. If it is adjudged that the First Division does not have jurisdiction of disputes involving yardmasters they will be *the only craft* under said transportation group VI-a and VI-b, or the "operating group," to be excluded!

CONCLUSION

It is respectfully submitted that the Railway Labor Act has been given a construction contrary to its plain terms and contrary to the clear intent of Congress. The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. ~~968, 969~~ 63-64

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, PRESIDENT, AND F. H. NEMITZ, SENIOR VICE PRESIDENT, AND BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, PRESIDENT, AND S. R. HARVEY, ASSISTANT PRESIDENT, *Petitioners*,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES, AND J. M. COX, *Respondents*, AND RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY, AND SOUTHERN PACIFIC COMPANY, *Intervenors-Respondents*.

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, AND FRED LEWIS, INDIVIDUALLY AND AS MEMBERS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD, *Petitioners*,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES, AND J. M. COX, *Respondents*, AND RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY, AND SOUTHERN PACIFIC COMPANY, *Intervenors-Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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April 8, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. 968, 969

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, PRESIDENT, AND F. H. NEMITZ, SENIOR VICE PRESIDENT, AND BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, PRESIDENT, AND S. R. HARVEY, ASSISTANT PRESIDENT, *Petitioners*,

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BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 152 F.2d 325 (December 21, 1945).

STATUTE INVOLVED.

The Railway Labor Act, as amended in 1934, provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions shall be handled on the property of the carrier concerned and, if unadjusted, may be referred to "the appropriate division of the Adjustment Board." 45 U. S. C., Sec. 153 First (i). The carriers and the national labor organizations are authorized to select their respective representatives on the Adjustment Board and to designate the division on which each such representative shall serve. 45 U. S. C., Sec. 153 First (b) and (c).

The question in this case involves the jurisdiction of the First and the Fourth Divisions of the Adjustment Board over disputes involving yardmasters. Section 3 First (h) of the Act, 45 U.S.C., Sec. 153 First (h), which defines the respective jurisdictions of the four divisions of the Adjustment Board, is set forth in full in the appendix to this brief (*infra*, page 23).

QUESTION PRESENTED.

The question presented is whether the First or the Fourth Division of the National Railroad Adjustment Board has jurisdiction over disputes involving railroad yardmasters, which in turn depends upon whether yardmasters are or are not included within the term "yard-service employees" as used in Section 3 First (h) of the Railway Labor Act.

STATEMENT OF THE CASE.

The National Railroad Adjustment Board was created by Section 3 of the Railway Labor Act in 1934. The first awards of the Board were issued in 1935.[1] This case is the outgrowth of a difference of opinion that arose in the very first days of the Board, and that has remained unsettled ever since, over the jurisdiction of the First and the Fourth Divisions of the Adjustment Board with respect to disputes involving railroad yardmasters.

The jurisdiction of each division of the Board is specifically defined in Section 3 First (h) of the Act. We are concerned here only with the First and the Fourth Divisions, since it is admitted that disputes involving yardmasters are not assigned to the Second or the Third Division. The First Division has jurisdiction over disputes involving

> "train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees."

It will be noted that yardmasters are not specifically mentioned. The Fourth Division has jurisdiction over disputes involving employees of marine carriers,

> "and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions."

Yardmasters are included in the membership of several labor organizations. The largest group is in the inter-

[1] The awards are published by the National Railroad Adjustment Board in four series of bound volumes, one series for each of the four divisions. Award No. 1, First Division, is dated April 4, 1935, and Award No. 1, Fourth Division, is dated March 29, 1935.

venor-respondent, Railroad Yardmasters of America, a labor organization national in scope. Yardmasters employed by 30 rail carriers, having 52% of the total railroad mileage of the country, are represented by that organization. Other labor organizations, exclusive of petitioners, the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, include within their membership yardmasters employed by 22 rail carriers having 17% of the total railroad mileage. Yardmasters employed by 15 carriers, with 13% of the total railroad mileage, are represented by petitioner, Brotherhood of Railroad Trainmen,[1] and yardmasters employed by 9 carriers, with 6% of the total railroad mileage, are represented by petitioner, Order of Railway Conductors. Considering only the mileage of railroads having yardmaster representation, the intervenor-respondent, Railroad Yardmasters of America, has 60% of the represented mileage, other labor organizations exclusive of petitioners have 18%, the Brotherhood of Railroad Trainmen has 15%, and the Order of Railway Conductors has 7%. R. 161-162.[2]

The Railroad Yardmasters of America is, as its name indicates, an organization of yardmasters, a restricted class of railroad employees, their work being wholly supervisory in character. R. 162-163. Within the Order of Railway Conductors and the Brotherhood of Railway Trainmen, which are two of the so-called "big four" organizations of railroad employees, the yardmaster members are a small minority, the main membership of those organizations consisting of conductors, en-

[1] The table at R. 162 should show 15 carriers for the Brotherhood of Railroad Trainmen, as per the original stipulation, but by misprint it shows only 11.

[2] The statistics given are as of July 8, 1942, the date of the stipulation. R. 170.

gineers, firemen, brakemen, switchmen, and hostlers.[1] The members of those crafts who are employed in yard service are subordinate and subject to the supervision and discipline of yardmasters.[2]

The petitioners, Order of Railway Conductors and Brotherhood of Railroad Trainmen, have and always have had representatives on the First Division of the Adjustment Board, which hears disputes involving train-service and yard-service employees; the intervenor-respondent, Railroad Yardmasters of America, has never secured member representation on either the First Division, or the Fourth, or any other division of the Adjustment Board. R. 156-157.

In the absence of specific assignment under the Act, the Railroad Yardmasters of America and the railroads have taken the position from the beginning that disputes involving yardmasters, like those of various other supervisory employees whose disputes are not specifically assigned to some other division, are subject to the catch-all jurisdiction of the Fourth Division. The Railroad Yardmasters of America submitted a dispute involving yardmasters to the Fourth Division in 1935,[3] but in deference to the position of petitioners' representatives on the Adjustment Board, the labor members of the Fourth Division produced a deadlock on the question of jurisdiction. The same action was taken on three yardmaster disputes submitted to the Fourth Division in March 1938. R. 157-158. Thereupon, the Railroad Yardmasters of America filed suit in the District Court of the United States for the

[1] *Report to the President by the Emergency Board appointed May 31, 1943 pursuant to the Railway Labor Act*, dated September 25, 1943, pp. 13-14, n. 2.

[2] R. 162-166.

[3] First Annual Report of the National Mediation Board, including the Report of the National Railroad Adjustment Board, for the fiscal year ended June 30, 1935, p. 58; see also Second Annual Report, p. 46, and Third Annual Report, p. 34.

Northern District of Illinois, Eastern Division, for a judgment holding yardmaster disputes to be subject to the jurisdiction of the Fourth Division. A decree in its favor was rendered July 1, 1938. R. 158, 171-181.[1] Comparatively few yardmaster disputes arise, but ever since that decree the Fourth Division has regularly accepted yardmaster submissions from the Railroad Yardmasters of America and other yardmaster organizations, including one from the Order of Railway Conductors.[2]

In 1937, the First Division, which disposes of approximately one thousand disputes a year and is years behind in its docket,[3] decided two yardmaster disputes on the

[1] It is stated on page 3 of the petition for certiorari that this decree was "induced by collusion of the parties and without any consideration of the issues involved." The earlier decree was given no effect by the District Court in reaching the decision in this case, and the matter is referred to by petitioners only because it is deemed prejudicial. It should be noted, we think, that the same judge who entered the first decree, and criticized it for the reason stated, was the trial judge in the instant case.

The defendants in the 1938 case were all of the members of the Fourth Division, both the carrier members and the labor members. The defendants did not contest the entry of judgment as prayed in the complaint, and judgment was entered. In its memorandum opinion herein the trial judge stated (R. 224):

> "The court was not advised that there was a public question involved or that anyone aside from the parties had any interest in the question presented."

The court further stated (R. 224):

> "In my opinion I am not bound by that decree in this or any other case where there is a real contest, a decree which it appears I was induced to enter by collusion of the parties and without any consideration of the issues involved."

The trial judge (Holly) having thus found that he was not bound by his earlier decree, proceeded to decide the issue presented to him here solely on the record made at the trial of this cause. R. 223-224.

[2] See Annual Reports of the National Mediation Board, including Reports of the National Railroad Adjustment Board, 1939 *et seq.*

[3] As shown by the Annual Reports of the National Board, including the Reports of the National Railroad Adjustment Board

merits, without consideration or discussion of the jurisdictional question.[1] Early in 1938, however, the presence of the jurisdictional issue being noted by the members of the division, they deadlocked on four yardmaster cases. This action was followed by the decree of July 1, 1938 mentioned in the preceding paragraph. On August 18, 1938 the Order of Railway Conductors joined with the Great Northern Railway Company in submitting a yardmaster dispute to the Fourth Division, but within a fortnight it withdrew and submitted the matter to the First Division. The carrier refused to join in this action and filed an objection to the jurisdiction of the First Division. No award has ever been rendered. R. 158, 159, 160. A submission made to the First Division in January 1941 by the Brotherhood of Railroad Trainmen, against which the Southern Pacific Company, the employer of the yardmaster involved, filed a similar objection, has also remained in the First Division unsettled. R. 159-160.

In January 1942, petitioners asked for a declaratory judgment holding disputes involving yardmasters to be referable exclusively to the First Division of the Adjustment Board. R. 2-10. The defendant carrier members of the First and Fourth Divisions, and the intervenors, Railroad Yardmasters of America, Great Northern Railway Company, and Southern Pacific Company, all prayed for a declaratory judgment holding disputes involving yardmasters to be subject to the exclusive jurisdiction of the Fourth Division. R. 93-104, 109-118, 126-127, 135-144. After a trial, the District Court held that the Fourth Division had exclusive jurisdiction, and on appeal the Circuit Court of Appeals affirmed the judgment of the District Court. R. 229-234, 271-280.

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[1] Award 1649, January 21, 1937 (yardmaster complaining of demotion), and Award 1896, April 14, 1937 (yardmasters complaining of displacement by other yardmasters). Each award recites, in the stereotyped language found in all First Division awards: "This Division of the Adjustment Board has jurisdiction over the dispute involved herein."

ARGUMENT.

Foreword.

Respondents believe that the statute gives exclusive jurisdiction over disputes involving yardmasters to the Fourth Division. The District Court and the Circuit Court of Appeals have so held on substantial evidence and after full hearing. The problem of statutory construction presented by the case is relatively simple. After thorough consideration by the two courts below, both reached the same conclusion, and the case is not of sufficient importance, we suggest, to merit review by this Court.

Representatives of the rail carriers will participate in the determination of yardmaster disputes whether such disputes are referable to the First or the Fourth Division.[1]

[1] On page 5 of the petition for certiorari, petitioners state:

> "The decision throws the disputes of an important *rail* craft to a board composed of representatives of *water* carriers and *maritime* unions contrary to the basic object of this section of the Railway Labor Act."

The reference to the Fourth Division as being "composed of representatives of water carriers and maritime unions" is inaccurate. The three carrier members of that division are representatives of railroad carriers, not water carriers, and the selection of the labor members is entirely in the hands of the national labor organizations. Section 3 First (b) and (c). In the courts below petitioners made similar statements as the basis for arguing, as is here implied, that the Fourth Division was not qualified by experience to handle railroad disputes. The intervenor, Railroad Yardmasters of America, which represents the majority of that craft, does not share that view, and the plain terms of the statute give that division a catch-all jurisdiction of all railroad disputes not assigned to the first three divisions. The fact is that while the Fourth Division does have jurisdiction over maritime disputes as well as its catch-all jurisdiction of railroad disputes, the annual reports of the Board show that since its inception more than 90% of the disputes determined by the Fourth Division were disputes arising in the railroad field.

No fear of inadequate protection of their interests in either event disturbs the respondents, and no question of prestige is involved so far as they are concerned. The case is essentially a contest between rival labor groups and may, for them, involve other considerations.

On the one side, insisting upon the exclusive jurisdiction of the First Division, are the Order of Railway Conductors and the Brotherhood of Railroad Trainmen. These large organizations include in their vast membership many train- and yard-service employees, but only a comparatively few yardmasters. Representatives of the Conductors and the Trainmen sit on the First Division, to which the disputes of the bulk of their membership are submitted. Throughout this case these organizations have argued that yardmasters' disputes should be submitted to the First Division either because yardmasters are closely associated with yard-service employees, in that they supervise their work, or because yardmasters are, according to the argument of these organizations, one of the classes of employees embraced within the general term "yard-service employees" as used in the statutory definition of the First Division.

The Railroad Yardmasters of America has thus far successfully resisted the efforts of its two great opponents, which both have representatives on the First Division, to gather all yardmaster disputes into that division. The intervenor organization has, in fact, no member representation on any division of the Board, notwithstanding the fact that it is a labor organization national in scope. R. 157. It is, of course, a much smaller and less powerful organization, confining its membership to yardmasters, but within its restricted field it represents yardmasters on 60% of the represented railroad mileage, several times as many as either of the petitioners.

The position of the Railroad Yardmasters of Amer-

ica on the construction of the statute is that yardmasters are by definition excluded from the class of yard-service employees, or yardmen, and that since the disputes of yardmasters are not given to the First Division they are subject to the jurisdiction of the Fourth Division by the express terms of the statute, which gives that division a residual or catch-all jurisdiction over disputes not assigned to the others.

Oral Testimony On the Meaning of the Term "Yard-Service Employees."

When this case was tried before the District Court, the carriers and the Railroad Yardmasters of America offered both oral and documentary evidence of the meaning of the term "yard-service employees," a term of long usage and of well-recognized meaning in the railroad field. Three railroad officials of long experience testified on the meaning of the term in railroad usage. The first witness, whose testimony was corroborated by that of the other two, stated (R. 191) that the term "yard-service employees"

> "refers to certain employees who make up and break up trains in yards within defined limits.
>
> "They also do other switching of cars, placing and pulling of cars at industries within those yards; namely, engineers, firemen, conductors or engine foremen, yard brakemen, switchmen or helpers, as they are termed."

The witness testified further that the term had been used in the railroad business for as long as he could remember to distinguish the employees in yard service, namely, engineers, firemen, conductors or engine foremen, and brakemen or switchmen, from similar employees engaged in the operation and switching of trains outside yard limits, who are on a different basis of pay. He stated

that yardmasters have never been known as yard-service employees. R. 191.

On direct examination, the one witness offered by the petitioners stated his view of the meaning of "yard-service employees" and in no way did he contradict the meaning assigned to the term by the carriers' witnesses. R. 211. In fact, the witness conceded that yardmasters are not actually included in the term "yard-service employees" by stating that he "would say that they fit more nearly in with the yard-service employees than with any other class." R. 211-212; see also R. 213. The District Court observed that this "certainly is not a statement they [yardmasters] are members of that class [yard-service employees]. It implies that they are not, that they are not in any class mentioned in the statute but are more nearly related to the class of yard-service employees than any other class." R. 226.

Relying on the unconflicting testimony of "experienced railroad officials and representatives of railroad employees," the District Court found as a fact that "railroad usage * * * has never included yardmasters and assistant yardmasters within the meaning of the terms 'yard-service employees' or 'yardmen,' and yardmasters and assistant yardmasters have never been regarded as yard-service employees or yardmen." R. 233. The conclusion of law naturally followed that the disputes of yardmasters, not being subject to the jurisdiction of the First, Second, or Third Division of the National Railroad Adjustment Board, were subject to the catch-all jurisdiction of the Fourth Division. R. 233-234.

In reviewing the action of the District Court, the Circuit Court of Appeals came to the following conclusion (R. 274):

> "The testimony of all the witnesses did not differ materially with respect to the definition of 'yard-

service employees' as used by those engaged in the railroad business, and the court's finding adopted that definition."

Notwithstanding the foregoing express observation of the two courts below on the substantial uniformity of the testimony, the petition for certiorari is based primarily on an alleged conflict in the evidence as to the meaning in the railroad field of the decisive term, "yard-service employees." Petitioners assert that the trial court's finding was "drawn from *conflicting oral testimony.*" This could only mean that the trial judge who saw and heard the witnesses considered the alleged conflict and found from a preponderance of the evidence that the term "yard-service employees," as used in the railroad business, did not include the craft of yardmasters. On the other hand, however, the petitioners argue that both the courts below "overlooked" the alleged conflict. The fact of the matter, as their respective opinions show, is that both courts thoroughly considered all the testimony and found that it sustained the judgment rendered.

Documentary Evidence of the Meaning of the Term "Yard-Service Employees."

At the trial in the District Court the petitioners offered no documentary evidence to show the actual usage of the disputed term in the railroad business, from which the term was taken. For the first time, their briefs in the Circuit Court of Appeals made reference to two claimed examples of trade usage of the term. Since then their search in the vast library of railroad literature has yielded five more examples which are now offered in support of the petition for certiorari (pages 15-18). This material is the basis for the assertion on pages 5-6 of the petitioners' brief that the Interstate Commerce Commission and certain other agencies dealing with railroad matters have "repeatedly

recognized the term 'yard-service employees' as specifically inclusive of yardmasters." The facts do not substantiate that assertion.

Three of the petitioners' claimed examples are not instances of usage at all. These are No. 2 (Interstate Commerce Commission), No. 6 (Director-General of Railroads), and No. 7 (National Railroad Adjustment Board). Consequently, the agencies mentioned must be eliminated from the list. No. 2 (Interstate Commerce Commission) shows on its face that it has no bearing on the question. No. 6 (Director-General of Railroads) is a statement of the rates of pay for yard foremen when they perform substitute duty for yardmasters; yard foremen (the men in immediate charge of yard crews, also known as engine foremen or yard conductors, R. 193) are undoubtedly yard-service employees, and their disputes are referable to the First Division, whether or not they are acting as substitute or so-called "footboard yardmasters." No. 7 is a reference to the Index Digest of the awards of the First Division, in which, under the index heading "Yard Service," the subheading "Yardmaster" appears. Among the thirty other subheadings under "Yard Service" are "Road Crews —Switching or Other Work in Yards" and "Road Service." If the "Yardmaster" subheading proves that yardmasters are yard-service employees, by the same token road crews are also yard-service employees.[1]

[1] Examination of the awards listed under the subheading "Yardmaster" shows the reason for its inclusion in the index under the heading "Yard Service." Awards 5204, 5205, and 5206, for instance, are described in the Index Digest dated March 1, 1941 (page 347) as "Claims of brakemen and yardmen account *other than train or yard service employees* performing switching." (Italics supplied.) The published awards show that the employees designated as "*other than train or yard service employees*" were *yardmasters* and *yard clerks*. The petitioners' example No. 7 therefore proves the very opposite of their contention. Many like examples of the ordinary usage of the statutory term are shown in the Appendix, *infra*, pages 24-30.

Three more of the petitioners' examples [1] show use of the term "yard service" in connection with the presentation of statistical data only, in which for convenient summary or purposes of computation the small craft of yardmasters has been listed along with yard-service employees as a part of the great class of operating employees. Yardmasters are properly included among the operating employees, but they are not yardmen or yard-service employees. The Interstate Commerce Commission does not so classify yardmasters,[2] and, as the petitioners concede in their brief (footnote 8, page 16), the inexact "general designations" cited by them were abandoned in the reports of the National Mediation Board (which include the annual reports of the National Railroad Adjustment Board), after the Third Annual Report for the fiscal year ended June 30, 1937.

The petitioners' one remaining example is their No. 5 (page 17 of petitioners' brief), which is taken from a statement of a dispute submitted to an early adjustment board back in 1929. This is petitioners' only illustration of true railroad usage, by which we mean usage of the term by railroad men who actually conduct the railroad business, the men who developed the meanings of the terms "yard service" and "yard-service employees" which were current when the 1934 Act was passed and were adopted by Congress in writing the statute. This example speaks of certain yardmasters having been employed "*for* yard service." The meaning of the passage, especially the use of the word "for," is not clear, and it certainly is not evidence that yardmasters are embraced *within* the term "yard-service employees" in ordinary and general railroad usage.

[1] Nos. 1, 3, and 4 on pages 16-17 of their brief.

[2] See Appendix, *infra*, pages 28-30.

Respondents respectfully invite the Court to compare the probative value of that dubious single example with the many examples of the use of the decisive terms which respondents introduced at the trial in the District Court, some of which are set forth in the appendix to this brief. Those exhibits show clearly and convincingly, by means of actual everyday usage, what employees *are* known as yard-service employees, and that yardmasters *are not* generally so designated. The exhibits are excerpts from the records of proceedings before the National Railroad Adjustment Board and from publications of the Interstate Commerce Commission; they illustrate the common usage of the terms "yard service," "yard-service employees," and "yardmen" by railroad labor organizations, by the carriers, and by administrative agencies. For example, the Order of Railway Conductors, petitioner here, refers to a carrier having taken over "the employes in yard service *and the yardmasters* employed by the Standard Oil Company."[1] In another illustration, a carrier and the Brotherhood of Railroad Trainmen, the other petitioner here, speak of a yardmaster who "returned to yard service."[2] In still another, the Brotherhood of Railroad Trainmen complains of the use of supervisory forces, including yardmasters, to perform "yard service,"[3] and in another, the First Division in one of its awards refers to "yard service employees" deprived of their proper employment by the use of supervisory forces, namely, yardmasters.[4] The exhibits just referred to, and the others set forth in the appendix to this brief, have the special merit of showing the habitual and candid railroad usage of the synonymous terms "yard-service employees" and "yardmen," and the term "yard

[1] See Appendix, *infra*, page 24. Italics here, and in all subsequent quotations in this brief, have been supplied, unless otherwise noted.

[2] See Appendix, *infra*, page 25.

[3] See Appendix, *infra*, page 25.

[4] See Appendix, *infra*, page 27.

service," in circumstances quite unconnected with the present case or with the controversy that gave rise to the case, and obviously without any thought of adding to or subtracting from the accepted meaning of those terms. They prove conclusively that the term "yard-service employees," as taken by Congress from the language of railroad men, does not include yardmasters.

If consideration is to be given to documentary evidence of the meaning of the terms in question, as petitioners now urge, it is unnecessary to go beyond the petition and this reply to show that that evidence overwhelmingly supports the judgment below.

In connection with the foregoing showing it is to be borne in mind that the record shows without dispute that the terms "yard-service employees" and "yardmen" are synonymous. All of the witnesses so testified. The petitioners' witness testified on cross-examination as follows (R. 212):

> "Q. • • • Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance 'yard-service employees' and 'yardmen' and 'yard crews' generally speaking mean the same thing?
>
> "A. Yes, sir."

The stipulation entered into by all parties and introduced as evidence at the trial (R. 155-170, 189) carefully distinguishes between the work performed by a yardmaster and the work performed by yard-service and other employees under the yardmaster's supervision. It distinctly recognizes that yardmasters are not yard-service employees in the following passage (R. 162):

> "*Yardmasters do not and may not perform the work of yardmen* and employees in train and engine service; they may perform some clerical work, if their entire time is not taken up with the direction and supervision of yardmen and other employees working in yards."

The work of a yardmaster consists in directing and super-

vising the tasks performed within his jurisdiction by yard-service employees and by *numerous other crafts* whose members are not yard-service employees (R. 162, 163-164, 198, 213). Yardmasters are, therefore, not yard-service employees, for those are the employees who actually make up and break up trains and switch trains and cars in the yards (R. 191, 211, 212-213).

We submit that the District Court employed the correct method of statutory construction in ascertaining, as a fact, the meaning of a railroad term used in a statute dealing with railroad affairs. *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364 (1926). The evidence on which the District Court's findings were based, and on which the Circuit Court of Appeals affirmed those findings, is manifestly substantial and without material conflict. Rule 52(a) of the Federal Rules of Civil Procedure provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Petitioners broadly assert that their arguments below were not given proper weight. It should be emphasized, therefore, that nothing submitted by any party was excluded, and that is was upon full consideration of the entire record by the Court of Appeals that it was held, not only that the conclusion of the District Court was responsive to the testimony of the witnesses, but that it was altogether consistent with the broad purpose and design of the statute as shown by its legislative history and by past practices. R. 274-277.

The Argument of Petitioners that Yardmasters Were Aligned With Yard-Service Crafts Prior to 1934.

Petitioners' statement in the brief (page 18) that yardmasters were in the past aligned with yard-service crafts for the submission of their disputes is quite inexact, both

in fact and in the implication it seeks to raise as to the meaning of the present statute. Under the various procedures employed in the settlement of disputes in the period before the existing law, some yardmasters' disputes were submitted to the same boards which decided the disputes of yard-service crafts and some were not. Prior to 1934, such adjustment boards as existed were set up by agreement between particular unions and particular carriers, and the result was that the disputes of those yardmasters and yard-service employees *who happened to belong to the same signatory organization* were heard by the board to which that organization and the carriers had agreed that all of that organization's disputes would be submitted. In short, the jurisdiction of the various boards was whatever the parties made it by their agreement. In actual practice the relatively few yardmasters who were members of the Order of Railway Conductors and Brotherhood of Railroad Trainmen had their disputes determined by the same board which heard the disputes of the yardmen who were members of those organizations. But the disputes of the rank and file of yardmasters who were members of other unions were heard by different boards.[1]

Prior to 1934, therefore, the whole machinery for resolving disputes was utterly different from the present system. It was the many unsatisfactory features of the old system that caused the enactment of the 1934 statute establishing jurisdiction, not on the basis of membership in par-

[1] The facts are stated in detail in the opinion of the Circuit Court of Appeals (R. 274-276), and the orders, regulations, and agreements referred to in the opinion are set forth in a collection of source materials made by Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, entitled *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board* (Book One), *Historical Background and Growth of Machinery Set Up for the Handling of Railroad Labor Disputes, 1888-1940* (Book Two).

ticular labor organizations, but on the basis of defined crafts.

The factors which necessitated the basic changes in jurisdiction affected by the 1934 amendments were recently stated by this court as follows:

> "Prior to 1934 the parties were free at all times to go to court to settle these disputes. Notwithstanding the contrary intent of the 1926 Act, each also had the power, if not the right, to defeat the intended settlement of grievances *by declining to join in creating the local boards of adjustment provided for by that Act.* They exercised this power to the limit. Deadlock became the common practice, making decision impossible. The result was a complete breakdown in the practical working of the machinery. * * * To break this log jam, and at the same time to get grievances out of the way of the settling of major disputes through the functioning of the Mediation Board, the Adjustment Board was created and given power to decide them.
>
> "The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. *Another tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them.* Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation." *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711.

The Court of Appeals commented upon this phase of petitioner's argument as follows (R. 276-277):

> "Under the Act of 1934, the jurisdiction of the Adjustment Board is not determined by representation or left to agreement; it is defined strictly in terms of disputes involving specified classes of employees, regardless of the labor affiliations of the members of the several classes. Under the present law, the several divisions of the National Adjustment Board were not created by signed agreement, but by statute which contains not a word to imply that the Order of Railway

Conductors and the Brotherhood of Railroad Trainmen may, or that the members of the Railroad Yardmasters must submit their disputes to the First Division.

"In view of these facts we think the District Court was correct in concluding that the historical alignment of yardmasters with the train and yard-service crafts in the settlement of disputes is not helpful in determining the question now before us."

The Claimed "Administrative Interpretation."

Petitioners rely upon "administrative interpretation," but the record shows that there has never been any settled administrative interpretation of the question here (*supra*, pages 5-7). This is the second of two court cases instituted by rival labor organizations to determine this jurisdictional controversy, for the very reason that there has never been any settled administrative practice in dealing with yardmaster cases, but only uncertainty and confusion.

In connection with their statement on this subject petitioners assert that difficulties will be experienced in the administration of the statute if a *yardmaster* complaining of a demotion to yardman is required to submit his dispute to the Fourth Division, while a *yardman* complaining of wrongful denial of promotion to a yardmaster position must submit his dispute to the First Division. But that condition exists in every instance in which jurisdiction of the disputes of supervising employees, and jurisdiction of the disputes of subordinates whom the yardmasters supervise, are lodged by the statute in different divisions. No such difficulties as those apprehended will be encountered once the question of jurisdiction is finally determined.

The submission of yardmen's disputes to one division, and the submission of yardmasters' disputes to a different division, is not only in strict conformity with the statute, but is a sensible and wholesome disposition of the matter. Such a division of assignments has actually been observed

for several years. Since 1938, when Judge Holly issued his first decree on the subject, the members of the Railroad Yardmasters of America, which represents the rank and file of the yardmasters, have submitted their disputes to the Fourth Division, while the disputes of yardmen who work under them have always been submitted to the First Division.

With respect to petitioners' argument on the alleged refusal of Congress to amend the Railway Labor Act so as to mention yardmasters specifically and exclude their disputes from the First Division, the Circuit Court of Appeals, observing that both bills went to a committee and were never reported out, concluded, properly we believe, as follows (R. 278-279):

> "Whether their demise by that method was due to the fact that the Committee thought they were undesirable or unnecessary we are not informed, and no presumption arises as to the cause."

Respondents pray that the petitions be denied.

Respectfully submitted,

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April 8, 1946.

APPENDIX.

Section 3 First (h) of the Railway Labor Act.

The respective jurisdictions of the four divisions of the National Railroad Adjustment Board are defined as follows in Section 3 First (h) of the Act, 45 U.S.C., Sec. 153 First (h):

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members,

five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

Documentary Exhibits Introduced at the Trial, Illustrating the Ordinary and General Railroad Usage of the Terms "Yard-Service," "Yardmen," and "Yard-Service Employees."

The exhibits here set forth were not included in the printed record on the appeal to the Circuit Court of Appeals, but by agreement they constituted a part of that record and were certified and transmitted to the Clerk of the Circuit Court of Appeals. R. 246-248, 251-254.

Award 4548 of the First Division (included in Plaintiffs' Exhibit K) was made in a dispute between the Order of Railway Conductors and the Elgin, Joliet and Eastern Railway Company. On the first page of the report of the award, under the heading "Position of Employes," the Order of Railway Conductors states that in 1934 the Railway Company—

> "took over the employes in yard service *and the yardmasters* employed by the Standard Oil Company."

In Docket 6406, First Division, *Order of Railway Conductors* v. *Chicago and North Western Railway Company*, the submission filed by the Conductors (Defendant's Exhibit 3) states the case of one Dunleavy, who was first employed as a brakeman, then as a conductor, and

was finally *promoted* to yardmaster in the Wood Street yard but thereafter, when that yard was closed down—

> "was required to *revert back* to yard and/or road service * * *."

In Docket 6837, First Division, *Brotherhood of Railroad Trainmen* v. *Chicago and North Western Railway Company* (Defendants' Exhibit 3-A), a joint statement signed by a division superintendent of the Railway Company and a local chairman of the Brotherhood of Railroad Trainmen, refers to Yardmaster Brazier, who displaced Yarmaster Meister—

> "'who in turn *returned to yard service* thus throwing Humm [a yardman] on the extra board.'"

Award 2065, First Division, related to a dispute between the Brotherhood of Railroad Trainmen and the Southern Pacific Company over the use of "*supervisory forces*" to perform "*yard service.*" The members of the "supervisory force" referred to by the Trainmen were "*Yardmasters* and other Supervisory force." Defendants' Exhibit 1-B, p. 1. Award 4466, First Division, related to a dispute between the Brotherhood of Railroad Trainmen and the Terminal Railroad Association of St. Louis over "use of yardmasters to perform the duties of yardmen." Defendants' Exhibit 1-E, p. 1. The dispute settled by Award 5816, First Division, *Brotherhood of Railroad Trainmen* v. *Missouri-Kansas-Texas Railroad Company*, was "account yardmaster performing *service for which yardmen are employed*" (Defendants' Exhibit 1-F, p. 1), and in the "Position of Employes" the Brotherhood of Railroad Trainmen made the following claim (Defendants' Exhibit 1-F, p. 2):

> "The Committee holds that the scope of the agreement *defines the class of employes known as yardmen, separating them from other classes of employees* for

the purpose of entering into agreements covering rates of pay, rules and working conditions applicable to yard switching.

"If it is the intent of the agreement to permit the Carrier to parcel its yard switching to *employes other than yardmen* there would be little need of a rule defining, classifying and separating yardmen from other employees.

"We submit that the Carrier's agreement with its yardmen involves valuable property rights in the form of seniority to its yardmen who should be given all yard work within the confines of their designated seniority territory. It is evident the Carrier declared definite intent of recognizing seniority rights of yardmen to all yard switching service when it entered into agreement with this Organization defining and classifying them as yardmen with established rates of pay and other rules designating and establishing segregated districts for yardmen to work and exercise seniority rights. *To construe such agreement as embracing less than all the yard service would render its yardmen's seniority rights and the current agreement of little or no value*, as the Carrier could parcel its yard switching to other groups of employes with the consequence that there would finally be nothing left which would be subject to the agreement with its yardmen."

In the submission leading up to Award 7355, First Division, *Brotherhood of Railroad Trainmen* v. *Texas and Pacific Railway Company*, the Trainmen accused yardmasters of performing specified items of "yard service." Defendants' Exhibit 1-G, p. 1.

The position taken by the Conductors and the Trainmen has also been taken by the Switchmen's Union of North America. See Defendants' Exhibit 1-A.

The carriers use the same language as the labor organizations. In Docket 11801, First Division (Defendants' Exhibit 3-B), the Brotherhood of Railroad Trainmen in its

submission states that one Thomas Estle worked as a "helper and/or foreman in charge of a crew in yard service" until he was made a yardmaster, and the Soo Line, in its submission, goes on to state that thereafter the yardmaster force was reduced and Estle—

"*returned to yard service* as a foreman and helper."

In Award 3609, First Division, *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Company*, the carrier's statement (Defendants' Exhibit 1-D, p. 3) speaks of certain yardmen who had been promoted to yardmaster positions and then, as a result of reduction in the yardmaster force,—

"*returned to yard service* in the exercise of their seniority rights under the Trainmen's Agreement."

The members of the First Division have in numerous cases used "yard-service employees" in a sense exclusive of yardmasters. Award 2065, as mentioned above (p. 52), settled a case in which the Trainmen complained of the use of "Yardmasters and other Supervisory force" to perform "yard service." The "Findings" of the First Division (Defendants' Exhibit, p. 36) contain the following language:

"This Division has rendered many awards denying Carriers the right to use supervising officers or others to perform the work of yardmen • • •.

"In the light of the consolidation agreement • • • that three yardmen should have been continued in service as herders, it is clear that *the yard service employes* involved in this dispute were deprived of service to which they were entitled and would have enjoyed had *supervisory forces* [that is, yardmasters] not been used to perform herders' work instead of yardmen."

See also Awards 1464, 1728, 3055, 4466, 5816, and 7355, all in the First Division (Defendants' Exhibits 1, p. 2; 1-A, p. 5; 1-C, p. 5; 1-E, p. 6; 1-F, p. 5; and 1-G, p. 35), in which

the First Division in its "Findings" used the same or substantially the same language as that just quoted.

The essential distinction between yardmasters and yard-service employees, in terms of the *supervision* performed by the first and the *yard service* performed by the second, was observed by the Fourth Division in the following passage in its opinion in Award 67, *Louisville and Nashville Railroad Company* v. *Railroad Yardmasters of America* (Defendants' Exhibit 1-H, p. 7):

> "During the period of construction of the Kentucky and Virginia Railroad, yard service under the supervision of a yardmaster was first established at Page, Kentucky, and later, when the line was built through to Lynch, Kentucky, yard service was established at Chad and Lynch, Kentucky, under the supervision of yardmasters located at Cumberland, Kentucky."

Illustrations of the Interstate Commerce Commission's use of "yard service" and "yard-service employees" are found in its report in *Ex Parte No. 106, Six-Hour Day Investigation*, 190 I.C.C. 750 (1932). Speaking of the Adamson Act, 39 Stat. 721, the Commission said (Defendants' Exhibit 2):

> "*Employees in road and yard service* * * *. In practice the provisions of that act have been applied to engineers, firemen, conductors, hostlers, baggagemen, brakemen, and flagmen in road and yard service."[1]

The Commission gives its own definition of "yard-service employees" in referring to certain rules—

> "applying to yard service employees—train and engine service, switch tenders, hostlers and hostler helpers— * * *."

The Interstate Commerce Commission's classification of railroad employees for reporting purposes is in accord with

[1] Italics not supplied.

the usage illustrated by the above quotations. This classification has been in effect since 1921, when the Commission issued an order with annexed rules entitled "Rules Governing the Classification of Steam Railway Employees and Reports of Their Service and Compensation." See Intervenor's Exhibit 6, first page (unnumbered). These rules set up forms for reports, on which the various classes of employees are arranged according to so-called Reporting Division. Same Exhibit, numbered pages 6-11.[1] Explanatory instructions pertaining to the forms stated that the Reporting Divisions were to be in accord with the definitions of such Divisions given in the *Classification and Index of Steam Railroad Occupations* prepared by the United States Railroad Labor Board. Intervenor's Exhibit 1.

The classification to which reference is made appears in Intervenor's Exhibit 1. This classification divides all railroad employees into so-called "Services." Yardmasters and yardmen are not in the same service. The yardmaster group is found under "Supervisory Skilled Trades and Labor Service," in which "the preponderant duties of incumbents are to supervise or to assist in supervising the work of subordinate foremen and other employees * * *." Intervenor's Exhibit 1. Yardmen, or yard-service employees, are found in a distinct service called "Train and Engine Service," in which the duties are "to operate or to assist in the operation of trains and engines in road and yard service; or to handle locomotives in and around yards and engine houses when not in road or switching service." Intervenor's Exhibit 1. The employees known generically as yard-service employees are listed

[1] By an order of July 17, 1940, effective August 1, 1940, new numbers were assigned to the Reporting Divisions, but the method of reporting railway wage statistics was not changed. Intervenor's Exhibit 6, first two pages (unnumbered).

under the Yard Conductor and Yard Foreman Group, the Yard Brakeman and Yard Helper and Switchtender Group, the Yard Engineer and Motorman Group, the Yard Fireman and Helper Group, and the Hostler Group. Intervenor's Exhibit 1.

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

NOS. ~~968-9~~ 64

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and **Brotherhood of Railroad Trainmen**, A. F. Whitney, President and S. R. Harvey, Assistant President,

Petitioners,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, Respondents. RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY and SOUTHERN PACIFIC COMPANY,

Intervenor-Respondents.

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, and FRED LEWIS, Individually and as Members of the National Railroad Adjustment Board,

Petitioners,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, Respondents. RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY and SOUTHERN PACIFIC COMPANY,

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BRIEF OF INTERVENOR-RESPONDENT, RAILROAD YARDMASTERS OF AMERICA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

NOS. 568-9

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. Fraser, President and F. H. Nemitz, Senior Vice-President; and **Brotherhood of Railroad Trainmen**, A. F. Whitney, President and S. R. Harvey, Assistant President,

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BRIEF OF INTERVENOR-RESPONDENT, RAILROAD YARDMASTERS OF AMERICA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The decision below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, is reported at 152 F. (2d) 325.

Questions Presented.

The only question actually in issue is whether the first or the fourth division of the National Railroad Adjustment Board has jurisdiction over disputes involving yardmasters. That question in turn depends entirely upon whether yardmasters are "train and yard service employees" within the meaning of section 3 first (h) of the Railway Labor Act. Hence, the only ultimate issue is the correctness of the district court's conclusions of law 2, 4 and 5 (R. 233-4). All other matters discussed in petitioners' brief are entirely collateral and argumentative.

Statement of the Case.

Petitioners have not stated the case in either petition or brief in such a way as to present the matter involved, and what is material to the consideration of the questions presented, as required by rules 38 and 27. Pages 2-6 of the petition and pages 15-18 of the brief do not fairly reflect the contents of the original complaint or the controlling facts.

There are in railroad service in this country about 6,200 yardmasters.[1] This intervenor-respondent has approximately 4,000 members, all of whom except about a dozen stationmasters, are yardmasters. The petitioner organizations are composed primarily of railroad employees in train and yard service. The Order of Railway Conductors has approximately 50,000 and the Brotherhood of Railroad Trainmen has approximately 196,000 members.[2] On the basis of their stipulated percentages of total railroad mileage, applied to the total number of yardmasters in service,

[1] Interstate Commerce Commission, wage statistics of Class I Steam Railways in the United States, No. M-300, November 1945.

[2] Florence Peterson, Handbook of Labor Unions (1944) pp. 319, 307.

these totals cannot possibly include more than approximately 375 and 800 yardmasters, respectively (R. 162). The structure of the Railroad Adjustment Board, as prescribed in section 3 of the act, and scrutiny of the record here (especially such parts thereof as pp. 47-51) clearly show that in instituting this proceeding petitioners had two objectives: First, to have their seniority claims in respect of yardmaster vacancies tried before a tribunal whose employee members are selected (as are those of the first division) by train and yard service representatives, i. e., principally by themselves; and second, to create a legal situation in which the weight of their numbers might be used to compel yardmasters to select the petitioner organizations rather than this intervenor-respondent as collective bargaining representatives. In short, this litigation is another attempt of large and powerful organizations to overwhelm smaller ones, eliminate them from competition, and monopolize the collective bargaining field.

This intervenor, not either of the petitioner organizations, is the leading representative of the craft or class of employees known as yardmasters on railroads. When the stipulation of facts was executed July, 1942 this intervenor-respondent was collective bargaining agent for yardmasters on 60% of the country's railroad mileage on which yardmasters are represented by labor organizations having in effect collective bargaining agreements in behalf of yardmasters and 52% of the total railroad mileage in the country, all as against much smaller percentages represented by plaintiffs respectively (R. 162).

Contrary to the inference which might be drawn from page 2 of the petition, the controversy as to which division of the National Railroad Adjustment Board has jurisdiction of disputes involving railroad yardmasters did not originate in August, 1941, or even in March, 1938. From the time of the adjustment board's organization, this inter-

venor-respondent had insisted, to the adjustment board and the national mediation board, that the fourth and not the first division of the adjustment board has jurisdiction of such disputes.[3]

Early in 1938 the petitioner organizations filed with the first division four disputes (docket Nos. 1198, 4503, 4504, 4505)[4] which on their face appeared to involve claims of four of their members as yardmasters. In January, 1938, the first division deadlocked on the question of jurisdiction and reported such deadlock to the interested parties. On March 15, 1938 this intervenor-respondent filed with the fourth division three yardmaster disputes (R. 157). The fourth division also deadlocked on the question of assuming jurisdiction (R. 158).

This intervenor-respondent thereupon brought action in the district court against all members of the fourth division for a writ of mandamus or mandatory injunction to command that division to hear the three yardmaster cases. The object of the petition (R. 171) was to cut through what otherwise might have been an endless spiral of deadlocks and failures to act, with the decisions of the two divisions in possible conflict. The answer of the carrier members of the fourth division (R. 175) was precisely what their previous contention that the fourth division has jurisdiction of yardmaster cases had led everyone to expect. As to the employee members, their contention that the first and not the fourth division has jurisdiction of such cases, which had deadlocked the fourth division, led this intervenor-respondent and everyone else in the proceeding to expect that they would resist the petition. When instead of doing so they failed to answer, the record suggests and there in fact

[3] National Mediation Board, First Annual Report (year ended June 30, 1935), p. 58.

[4] Published Awards, First Division, National Railroad Adjustment Board, Volume 15, pp. 341-360.

existed no cogent reason why default for want of answer and decree in accordance with the petition should not have been taken against them (R. 176). If by the recital which the petitioners take the trouble to italicize on page 3 of their petition, they intend to suggest that the decree was "collusive" in any sense other than that it was consented to by the answer of some of the defendants and based on the default of others, the suggestion is both unjustified and unjustifiable.

The assertion (petition 3), that the first division *continued* to assert jurisdiction over yardmaster disputes until August, 1941 is not correct and the trial court's finding (R. 230-1) that prior to August, 1941 the first division had heard disputes involving yardmasters and rendered awards in such disputes does not sustain it. In the cases in which awards were rendered the jurisdictional question was not raised. In August, 1938, petitioner Order of Railroad Conductors and respondent Great Northern Railway Company joined in submitting to the fourth division a dispute involving two yardmasters. Later, however, the case was withdrawn and in October, 1938 the petitioner organization made an *ex parte* submission to the first division, where the matter is still pending (R. 158-9, 160). No award has been rendered, seven and one-half years later, because of the deadlock between the carrier and labor members of that division over the jurisdiction of disputes involving yardmasters (R. 160). Several other disputes involving yardmasters docketed in the first division are in the same situation (R. 160-1). Since the carrier members of the first division formally stated their objection to the consideration of yardmaster disputes in a letter to the employee members dated August 28, 1941 (R. 27), disputes involving yardmasters have not been considered by the first division (R. 161).

The petitioner organizations and their executive officers thereupon on January 12, 1942 began this litigation by filing in the district court their complaint in the nature of a petition for declaratory judgment (R. 2) against the members of the first division. Subsequently by amendment the members of the fourth division, respondents here, were made additional parties defendant (R. 144-6). It is by the contents of petitioners' complaint that the scope of this litigation and their own rights in it must be tested. They allege (R. 3) that they bring the action in behalf of their members and in behalf of all others similarly situated whether members or not; and later (R. 4) that in October, 1938 and March, 1941, respectively, each of them had filed an alleged dispute in behalf of a yardmaster "otherwise known as a yard service employee" with the first division which that division on account of the jurisdictional controversy aforesaid had not heard or decided. Their complaint and supporting exhibits (R. 2-88) nevertheless will be searched in vain for any showing of anything resembling the positive and direct interest in the subject-matter of this intervenor-respondent. In short, the petitioners here have neither alleged nor proved anything more than a collateral or indirect interest in the answer to the question of statutory interpretation posed by this litigation.

The fact that yardmasters supervise yard service employees (petition 4) has no bearing on the scope of the first division's jurisdiction. The yardmaster is in charge of the yard and, naturally, of *all* the employees therein. Disputes involving clerks are under the jurisdiction of the third division. Disputes involving car inspectors are under the jurisdiction of the second division. Arguments of this kind may well explain the action of the Congress in creating the fourth division.

The recital (petition 5) as to the effect of the decisions below is both incorrect and misleading. There is no basis for the statement that the district court in holding that yardmasters were not yard service employees relied "entirely" upon the oral testimony of the three railroad executives who admittedly testified to that effect, as against the one whose like testimony petitioners attempt to construe as testimony to the contrary (R. 190-221). Nothing whatever in or out of the record justifies the assertion that either court ignored the documentary evidence (by no means all of which is reproduced in the printed record), or the stipulation of facts, to say nothing of the other aids to statutory construction to which petitioners advert. The circuit court of appeals based its total conclusions specifically on a study of the record as such (R. 273), referred at length to the history of the act and its predecessor statutes and based its conclusion that the "historical alignment" of yardmasters with the train and yard service crafts in settlement of disputes is not helpful, upon the facts so discussed. It is quite needless to add that the trial court's findings were based, specifically, upon consideration of documentary as well as oral evidence (R. 229).

Insofar as the terms "yard service" and "yard service employees" are technical terms in railroad usage, introduced into the railway labor act as railroad terms having the meanings customarily assigned to them in railroad parlance (findings 7-10; R. 232) which the petitioners nowhere seriously dispute, both courts were fully justified in relying primarily upon the testimony of experienced railroad officials and representatives of railroad employees (finding of fact 13, R. 233). But the "historical" evidence, even when pieced out by the new matters which appear at pages 15-18 of petitioners' brief here, is when examined and understood, to the same effect as the oral testimony.

As to "the facts in this case which warrant the issuance of a writ of certiorari" (petition 5) the sufficient reason why they do not warrant such issuance is that they are not true.

It is not correct to assert that the first division has been "deprived" of jurisdiction of yardmaster disputes *solely* on conflicting oral testimony as to the meaning of the term "yard service employees." The first division has not been "deprived" of anything. The question is not whether before the decisions below it had something which it no longer has. The question under the statute is whether the Congress intended to confer upon it jurisdiction over disputes involving yardmasters. If the Congress did not so intend but instead conferred that jurisdiction upon the fourth division, neither division can complain.

It is not correct to say that the various public bodies listed in item 2, petition 5, have recognized the term "yard service employees" as "specifically inclusive" of yardmasters. The same bodies repeatedly have distinguished between yard service employees who in railroad parlance the country over are only those engaged actually in the switching or handling of cars; and yardmasters who supervise the work of the several classes of yard service employees. Yardmasters universally and always, have been recognized as a separate class or category of employees engaged in supervisory service.

It is not correct to say that when the 1934 amendments were enacted yardmasters had been "traditionally aligned" with the train and yard service crafts for submission of their disputes to the boards of adjustment created under prior acts. The appellate court's review of this question (R. 274-7) is enough in this connection and its correctness is not disputed.

It is not correct to say that the prior administrative construction of section 3 first (h) by the first division is held without weight in ascertaining the intent of the Congress. Neither the trial nor the reviewing court so held. Neither court, it is true, sympathized with the suggestion that "experts in railroad terminology" are to be found only among the members of the first, to the exclusion of the other three, jurisdictions of the board. But obviously, the first division's own deadlock on the question of jurisdiction—part of the very conduct of that division which according to the allegations of the original complaint, brought this litigation about—cannot now be urged as a practical construction of the act binding on the federal courts.

It is not correct to say that the decisions below "throw" the disputes of yardmasters to a board composed of water carriers and maritime units "contrary to the basic object of this section of the railway labor act." Quite aside from the question what this basic object may be, it is again to be noted that the overwhelming majority of yardmasters and of labor organizations representing yardmasters prefer the fourth division. It is only the petitioner organizations, overwhelming in number of total rail employees, but a definite minority in actual yardmaster representation, who wish the organizational and jurisdictional advantage of a tribunal dominated by themselves.

It is not correct to say that the bills designed to exclude yardmaster disputes from the jurisdiction of the first division were rejected by the congressional committees to which they were referred. Those committees simply did not report the bills back to the Senate (R. 160, 170). That is not a rejection by the committees in question, nor is it legislative action of any kind, as the circuit court of appeals very correctly pointed out (R. 278-9).

Summary of Argument.

1. What the Congress meant by section 3 first (h) is an ordinary question of statutory interpretation. In deciding it, the first resort is to the language of the statute itself, but the Court, if need be, may also consider its legislative history, its earlier administrative interpretations and its subsequent construction by the legislature. If, however, it appears that a term used in it is one of special usage, then the question arises, what that term means in the parlance from which it came. The best guide in such case is the knowledge and experience of those who speak that parlance. The meaning of the term then becomes a question of fact to be resolved like any similar question. Once it is resolved, the only remaining question is, did the Congress, using such term in the statute, mean to use it in accordance with the usage of the trade, or in some other meaning to be gathered from some other supposed source of statutory construction? In every such case the Congress must be taken to have had the former intent, unless the contrary clearly appears. So tested, the conclusions of both trial and appellate courts as to the meaning of the term "yard service employees" were correct both under Federal Rules of Civil Procedure, Rule 52(a) and under the general principles applicable to findings of fact; and the correctness of their decisions as to the meaning of the statute follows inevitably.

2. Nothing whatever, in this record, the orders and regulations of various bodies administering various phases of the acts of Congress relating to interstate commerce, the legislative history of the act, or its subsequent legislative construction, modifies the foregoing plain conclusions.

ARGUMENT.

I.

The Circuit Court of Appeals was right in deciding that the findings of fact of the District Court as to the meaning of the term "yard service employees" were fully sustained by the evidence.

At the outset of their argument it is obvious that petitioners are confused between the question of the proper construction of section 3 first (h) on the one hand, and the subsidiary question of the meaning of the term "yard service employees" as used therein, which must be resolved as a question of fact preliminary to such construction. Admittedly a federal court construing an act of Congress may consider primarily the language used by the Congress, and also, if necessary as aids, the legislative history of the statute; prior administrative interpretations; and subsequent legislative construction by the Congress itself. *Great Northern Railway Co.* v. *United States*, 315 U. S. 262, 277. Where a statute incorporates a term of special usage, however, and the Court must first determine the sense in which the Congress used such term, nothing in these rules of statutory construction overturns the best evidence rule. Hence the trial court was quite correct in listening to the testimony of men skilled in the parlance from which the term "yard service employees" came. It would have been correct had the question arisen, in preferring their testimony to inferences to be drawn from legislative history and administrative background, unless those inferences were so clear as to indicate that the witnesses so skilled did not in reality know what they were talking about. The appellate court, reviewing findings of fact based on a record composed in part of such testimony and in part of documents,

was right in deciding that the trial court's findings of fact were amply sustained by the record and should not be overturned, both under F. R. C. P. 52 and under general rules of trial and appellate procedure.

Petitioners, of course, are entirely inaccurate in asserting (brief 11) that either trial or appellate court ignored the documentary evidence or that the documentary evidence contradicted the oral testimony. The stipulation executed by the present petitioners as well as by the other parties as to the nature of a railroad yard, the work done by yard service employees, and the supervisory functions of yardmasters (R. 162-9) is enough to indicate that the finding that yard service employees do not include yardmasters and assistant yardmasters must be sustained, even if all oral testimony were disregarded and attention directed to the documentary proof alone. The opinion of the circuit court of appeals and especially that part of it which appears at pp. 274-7 of the present record, is enough to indicate that the petitioners' analysis of the processes by which the circuit court of appeals arrived at its decision is grossly inaccurate.

The decisions of this Court, petition, p. 7 and brief, p. 13, are not to the contrary, but sustain both district and appellate court. In *United States* v. *Cooper Corporation*, 312 U. S. 600, this Court held that, taking into consideration the text of the section construed, the use of the same term elsewhere in the same statute, the scheme and structure of the legislation itself and the use of like terms in supplemental legislation, as well as judicial decisions and legislative history, the words "any person" in section 7 of the anti-trust act do not include the United States as a party entitled to maintain an action for treble damages. The instant case likewise resembles *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107-11, in which this Court

held (reversing the circuit court of appeals and affirming the district court) that the term "sub-contractor" in section 2(a) of the Miller act does not include a materialman who merely sells materials to contractors. In so holding, this Court said that the policy of the act, to protect those whose labor and materials go into public projects, does not warrant disregard of the plain words of the act itself: "Specific terms prevail over the general term in the same or another statute which otherwise might be controlling" (*Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208); and that the practical considerations underlying the act, as well as the clear distinction between sub-contractors and materialmen to be gathered from the reports of hearings before congressional committees, precluded any other construction. As to divergent decisions of state and lower federal courts, this Court in footnote 6, 322 U. S. 108, said "Any loose, interchangeable use of 'sub-contractor' and 'materialman' in any prior decision of ours is without significance." This observation applies as well to the references in paragraphs 1-7, pp. 15-18 of petitioners' brief,—even if those references, most of which postdate the enactment of section 3 first (h), can be a guide to the Congressional understanding of the term "yard service employees" at the time of enactment.

In summary, petitioners suggest, and the entire record, with other matters within the scope of judicial notice in fact disclose, no reason why rule 52(a) does not apply to the trial court's finding as to the meaning of the term "yard service employees," especially insofar as the record presents any conflict. Again the cases at p. 7 of the petition and p. 13 of the brief are not to the contrary. *District of Columbia* v. *Pace*, 320 U. S. 698, for example, holds simply that rule 52 did not supersede the special provisions for review contained in the act creating the board of tax appeals for the District of Columbia. Such holding

obviously has no application to the findings here, as to the meaning in railroad parlance of the term "yard service employees," and as to the exclusion of yardmasters and assistant yardmasters from that meaning.

II.

Nothing in the extraneous matters relied upon by petitioners created any reviewable question of error in the findings of the District Court or the decision of the Circuit Court of Appeals.

It remains only to inquire whether there is anything in the excerpts from administrative reports (brief 15-18), the alleged alignment of yardmasters with train and yard service crafts for submission of disputes (brief 18), or the first division's own interpretation of section 3 first (h) (brief 19-20), which calls for review of the decision of the circuit court of appeals that findings 7-13 of the district court are not to be disturbed (R. 272-274).

1. If there were nothing else on the subject, in or out of the record, the agency report citations (brief 15-18) would be totally insufficient to establish any such "uniformity of terminology" (brief 15) as petitioners claim. The report of the 1943 emergency board was not directed to and can have no possible bearing upon, the question with which the district court and the circuit court of appeals were dealing in this case. Yardmasters were mentioned in that report because, and only because, these very petitioners brought their yardmaster members into the proceeding with them (R. 162; ante p. 3). Needless to say, the handling of yardmaster disputes by the National Railroad Adjustment Board was not even mentioned in the report.

As to the first three reports of the National Mediation Board (brief 16) beginning with the fourth annual report

for the fiscal year ended June 30, 1938 the heading relied upon by petitioners as some sort of evidence of Congressional intent was discontinued; and the fourth to eleventh annual reports, inclusive, treat yardmasters and yard service employees in separate categories as far as their controversies before the Adjustment Board are concerned.

Naturally the Brotherhood of Railroad Trainmen, petitioner here, included in the information furnished by it to the Railroad Retirement Board (brief 16) for its operating manual for field officers the words "yardmasters and assistant yardmasters." Again see R. 162; ante p. 3.

Decision No. 2948 as appears from the context, brief 17, involved a dispute which under the 1934 act would properly be triable to the first division. It was not a dispute "involving yardmasters" at all. On the contrary, it involved the question of the right of the employees therein mentioned to exercise seniority *as yardmen* in which respect they are protected and governed by the agreement *covering yardmen.*

Foot-board yardmasters (brief 17) are not yardmasters at all. They are yard foremen or conductors who are paid compensation (usually 5¢ an hour) above the regular foreman's or conductor's rate, for supervising their own crews. Since at least as early as the operations of the United States Railroad Labor Board they have uniformly been treated as belonging to a different class or craft, coming under and being governed by the same agreements as yard foremen, yard conductors and yard brakemen.[5]

We do not believe the method used by the National Railroad Adjustment Board in indexing the awards of the first

[5] Rules for Reporting Information on Railroad Employees, together with a Classification and Index of Steam Railroad Occupations, Railway Labor Board, Chicago, Illinois, May, 1921, pp. 249, 255-7, 320.

division (brief 17) is any indication of the Congressional intent.

Finally it must be noted again, as to nearly all of the references so relied upon by the petitioners, that they are of dates subsequent to the 1934 amendments to the Railway Labor Act and therefore can hardly elucidate the Congressional intent at and before the enactment of the statute.

As opposed to these isolated and misinterpreted instances there are clear rulings of the same agencies, of much earlier dates, in support of the decisions below. Granting that extended quotation and analysis is inappropriate at this point, the District Court and the Circuit Court of Appeals had before them, in the record or by citation, such examples as the following:

Interstate Commerce Commission, Ex parte 72, Order of February, 1924 (intervenor's exhibits 2-5, in the record, though not printed in the Circuit Court of Appeals).

United States Railroad Administration, General Order No. 27.

United States Railroad Labor Board decisions, Nos. 2, 147, 1266.

Interstate Commerce Commission Regulations Governing making and offering of nominations to United States Railroad Labor Board, April 16, 1921.

Interstate Commerce Commission, Ex parte Order No. 106 (6-hour day investigation, dated December 6, 1932).

Interstate Commerce Commission Rules of Classification adopted July 17, 1940, intervenor's exhibit 6 (also in the record but not printed in the Circuit Court of Appeals).

2. The argument as to the "historical alignment" of yardmasters with train and yard service crafts in the set-

tlement of disputes under prior acts is effectively disposed of by the opinion of the Circuit Court of Appeals, R. 274-7. The first division's having taken jurisdiction of disputes "involving yardmasters" in cases in which no jurisdictional question was raised, and its deadlock on the jurisdictional question when raised—the very genesis of the dispute which caused the complaint for declaratory judgment to be filed—is hardly a contemporaneous interpretation which can aid, much less bind, the federal courts in deciding what section 3 first (h) means. It may be noted in passing that the words "involving yardmasters" first came into this litigation *via* the complaint. Nowhere in the record, in the briefs below, or here, do petitioners say what they think it means. The conclusion, in the opinion of the Circuit Court of Appeals, that it means in effect cases in which the subject matter of dispute or controversy is some right or claim of a yardmaster or assistant yardmaster in his capacity as such (R. 277) seems inherently sound and the petition and brief suggest no cogent reason why that is not what the Congress had in mind in parceling out disputes to the respective four divisions of the board.

3. The argument under subdivision IV, page 21 of the brief, is another complete *non sequitur*. There is no presumption that the latter part of section 3 first (h) is meaningless. Its language with respect to the fourth division is plain and unambiguous. It is that the fourth division shall "have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second and third divisions." The statute does not state "all other employees *of such* carriers" or "all other employees of carriers *engaged in the transportation* of passengers or property by water" but *all other* employees "*of carriers over which jurisdiction is not given to the first,*

second and third divisions." The use of a comma after the word "water" is also significant and indicates that a different group of employees was contemplated by the last clause. Otherwise there would be no necessity for the clause and it would have been omitted, since the first part of the sentence includes disputes involving all employees of carriers engaged in transportation by water.

4. As heretofore pointed out, the senate committee on interstate commerce did not "reject" the proposed amendments (brief 22). What it did was not to report them out. The opinion below (R. 278-9) completely disposed of this argument.

Conclusion.

The petition and brief ignore the fundamental question whether the decisions of the District Court and the Circuit Court of Appeals were basically sound and just. They point out no probable cause to believe that either court committed any error in either form or substance. Both decisions clearly were correct unless there is to be gathered from section 3 first (h) of the Railway Labor Act a Congressional intention that the class or craft of supervisory employees known as yardmasters should and must be compelled to try their controversies with carriers before a tribunal whose employee members are selected by the very classes or crafts which in the course of their duties they must supervise. Unless made clear either by the clear language of the act, or by some implication which in view of its history and purpose is inescapable, no such Congressional intention should be presumed.

In holding that the Congress intended otherwise, both the District Court and the Circuit Court of Appeals were so clearly right as to leave no question for this court's review. Their decisions involve no error of law. They decided no

federal question, substantial or otherwise, in a way probably in conflict with applicable decisions of this Court. They did not in deciding any such question depart from the accepted and usual course of judicial procedure. There is in this record no question of construction of a federal statute, or other question of federal law, which has not been fully settled heretofore by repeated decisions of this Court. There is thus no question justifying issuance of the writ of certiorari under section 5(b) of rule 38 or any of the other rules laid down to govern the granting of such writs. The petitions should be denied.

Respectfully submitted,

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April 5, 1946.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 63 and 64

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, PRESIDENT, AND F. H. NEMITZ, SENIOR VICE PRESIDENT, AND BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, PRESIDENT, AND S. R. HARVEY, ASSISTANT PRESIDENT, *Petitioners*,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES, AND J. M. FOX, *Respondents*, AND RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY, AND SOUTHERN PACIFIC COMPANY, *Intervenors-Respondents*.

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. EEACH, AND FRED LEWIS, INDIVIDUALLY AND AS MEMBERS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD, *Petitioners*,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES, AND J. M. FOX, *Respondents*, AND RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY, AND SOUTHERN PACIFIC COMPANY, *Intervenors-Respondents*.

BRIEF OF RESPONDENTS, CARRIER MEMBERS OF FIRST AND FOURTH DIVISIONS, NATIONAL RAILROAD ADJUSTMENT BOARD, AND INTERVENORS-RESPONDENTS, GREAT NORTHERN RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY.

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Opinions Below.

The opinion of the District Court, which is not officially reported, appears at R. 222-227.

The opinion of the Circuit Court of Appeals appears at R. 271-279 and is reported in 152 F. 2d 325 (December 21, 1945).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U. S. C. §347). Petitioners applied on March 18, 1946 for a writ of certiorari to review the judgment of the Circuit Court of Appeals entered December 21, 1945, and this Court granted certiorari on April 22, 1946.

Statute Involved.

The statute involved is the Railway Labor Act, and particularly Section 3 First (h), which defines the jurisdiction of the four divisions of the National Railroad Adjustment Board. That section is quoted in full in the appendix to this brief (*infra*, p. 73).

STATEMENT OF THE CASE.

The Issue.

The Circuit Court of Appeals affirmed the declaratory judgment of the District Court, holding, as respondents contended, that the Fourth Division of the National Railroad Adjustment Board has exclusive jurisdiction of disputes involving yardmasters. Petitioners claim that the First Division has exclusive jurisdiction of such disputes.

The Railway Labor Act, as amended in 1934, provides that "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," if unadjusted, may be referred to "the appropriate division of the Adjustment Board." 45 U. S. C., Sec. 153 First (i).

The single issue below was whether the First or the Fourth Division has jurisdiction of disputes involving railroad yardmasters, which in turn depends upon whether or not yardmasters are "yard-service employees" whose disputes are expressly assigned to the First Division. If yardmasters are not "yard-service employees" their disputes are subject to the catch-all jurisdiction of the Fourth Division.

The jurisdiction of the four divisions of the Board is defined in Section 3 First (h) of the Act. Disputes of employees in certain specifically designated crafts are assigned to each division. The Fourth Division has also a catch-all jurisdiction of all disputes not assigned to the other three divisions. The parties are in agreement that the statute does not assign disputes involving yardmasters

to the Second or the Third Division. The First Division has jurisdiction over disputes involving

> "train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees."

It will be noted that yardmasters are not specifically mentioned. The Fourth Division has jurisdiction of disputes involving employees of water carriers, and

> *"all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions."*[1]

The Parties.

This is primarily a contest between rival labor organizations whose memberships include yardmasters. On one side of the controversy are the Brotherhood of Railroad Trainmen and the Order of Railway Conductors, on the other, the Railroad Yardmasters of America.

The petitioners, the Trainmen and Conductors organizations, two of the so-called Big Four railroad labor organizations, include in their vast membership many train- and yard-service employees, but relatively few yardmasters.

The intervenor-respondent, Railroad Yardmasters of America, represents a majority of the yardmasters. In its brief in this Court that organization asserts that it now represents in excess of 70% of all yardmasters. It is agreed (R. 161-162) that in August 1943, when the parties entered into a stipulation of facts, the representation of yardmasters by labor organizations was as follows:

---

[1] The emphasis here and in all other quotations in this brief has been added, unless otherwise noted.

Labor Organizations	% of Railroad Mileage Represented
1. Petitioners:	
Brotherhood of Railroad Trainmen	15
Order of Railway Conductors	7
Total, Petitioners	22%
2. Intervenor-Respondent:	
Railroad Yardmasters of America	60
3. Other Organizations:	
System Associations	7.5
American Railway Supervisors' Association	4.5
Railroad Yardmasters of North America	5
Switchmen's Union of North America	1
Total, Intervenor-Respondent and Others	78%

The carrier and the labor members of the First and the Fourth Divisions of the Adjustment Board were made defendants. The carrier members of both divisions, respondents here, were appellees below. The labor members of the First Division, petitioners here, were appellants below; the labor members of the Fourth Division made no appearance.

The Interests of the Respective Parties.

Each division of the National Railroad Adjustment Board is made up of an equal number of labor and carrier representatives. The national labor organizations, and the carriers, are authorized by the statute to select their respective representatives and to designate the division on which each such representative shall serve. 45 U. S. C., Sec. 153 First (b) and (c). The petitioners, the Trainmen and Conductors organizations, have placed two of

their members on the First Division and contend that all yardmaster disputes must be heard by that division.

The intervenor, Railroad Yardmasters of America, which represents yardmasters on three times as much mileage as both of the petitioners together, but has not succeeded in placing one of its members on any division, contends that the Fourth Division has jurisdiction of yardmaster disputes. Other labor organizations which have, in the aggregate, 17% of the represented mileage, and like the intervenor do not have a member representative on any division, also submit their disputes to the Fourth Division.[1] In short, the two petitioners, which purport to speak for all yardmasters but in fact represent only a small minority (22%) of that craft, contend that all yardmaster disputes shall be heard by the First Division on which they have two member representatives, whereas the intervenor and other yardmaster organizations, which represent 77% of the yardmasters, but have no member representative on any division, submit their disputes to the Fourth Division.[2]

This is the second case to arise out of the controversy over the handling of yardmaster disputes. In the instant case petitioners asked the District Court to declare that the First Division has jurisdiction of such disputes. In 1938, within three years after the Board began to function,[3] the Railroad Yardmasters of America, intervenor

[1] See Annual Reports of the National Mediation Board, including Annual Reports of the National Railroad Adjustment Board, 1937, p. 34, 1939, p. 41, 1941, p. 60, 1942, p. 60, 1943, p. 60, and 1944, p. 56.

[2] The Switchmen's Union of North America, which has 1% of the represented mileage (see table, *supra*, p. 5), has a member representative on the First Division but has not joined with the petitioners in this suit.

[3] The National Railroad Adjustment Board was created by Section 3 of the Railway Labor Act in 1934. The first awards of the Board were issued in 1935. The awards are published by the

here, sought a mandatory injunction requiring the Fourth Division to accept yardmaster disputes. Members of the Fourth Division were the defendants in that suit (referred to herein as Chancery No. 16031) and did not oppose the petition. The Trainmen and Conductors, petitioners here, did not intervene in the case. A decree was entered declaring that the Fourth Division had jurisdiction of yardmaster disputes and directing that division to hear and determine certain yardmaster disputes over the acceptance of which the carrier and the labor members had deadlocked. R. 119.

The carriers as a group have representatives on both the First and the Fourth Divisions, and except for the fact that the great majority of the yardmasters desire to have their disputes heard by the Fourth Division, the carriers' only interest in the controversy is that the direction of the statute be observed in the determination of yardmaster disputes. The carriers believe that the statute lodges jurisdiction of such disputes in the Fourth Division, as contended by the intervenor, Railroad Yardmasters of America.

National Railroad Adjustment Board in four series of bound volumes, one series for each of the four divisions. Award No. 1, First Division, is dated April 4, 1935, and Award No. 1, Fourth Division, is dated March 29, 1935.

Summary of Argument.

1. The term "yard-service employees" was taken from the railroad industry, in which it has a particular and well-defined meaning. The District Court found from the evidence that the term does not include yardmasters. There was no conflict in the oral testimony on the meaning of the term, and the accuracy of that testimony was conclusively established by respondents' documentary evidence showing the regular usage of the term by labor organizations, the carriers, and administrative agencies. The Circuit Court of Appeals correctly held that the District Court's finding was amply supported and should not be disturbed, and properly affirmed the District Court's conclusion that yardmasters, not being included among the crafts whose disputes are assigned to the First Division, are required by the statute to submit their disputes to the Fourth Division.

2. Implicitly recognizing that yardmasters are not yard-service employees, petitioners have built their case from the beginning on the argument (a) that yardmasters and yard-service employees were "aligned together" prior to the enactment of the present statute in 1934, (b) that since 1934 there has been an "administrative interpretation" that the jurisdiction of the First Division includes yardmaster disputes, (c) that disputes of yardmasters should be submitted to the First Division because their work is closely related to that of the yard-service employees whom they supervise, and (d) that the Fourth Division is primarily a marine body:

(a) The claim of an historical alignment of yardmasters and yard-service employees prior to 1934, whether in labor representation or in the submission of disputes to adjustment boards, is at variance with undisputed facts. Peti-

tioners' representation of yardmasters prior to 1934 was insignificant. The Railroad Yardmasters of America is and always has been the principal yardmaster organization. If and to the limited extent that there were, prior to 1934, any yardmaster disputes and disputes of yard-service employees submitted to the same adjustment board, that board had jurisdiction only because of the consent of a particular labor organization or organizations and a particular carrier or carriers, evidenced by a written agreement, and not because any one considered yardmasters to be yard-service employees. Under the present statute, however, the jurisdiction of the several divisions of the National Railroad Adjustment Board is defined in terms of crafts or classes of employees, without regard to labor representation or employment by a particular carrier. Consequently, even if yardmasters and yard-service employees had been "aligned" in the past, that fact would not draw the disputes of yardmasters into the First Division if they were not yard-service employees.

(b) The claimed administrative interpretation of the jurisdiction of the First Division has never existed. Within three years after the National Railroad Adjustment Board began to function, both the First and the Fourth Divisions had deadlocked on the acceptance of yardmaster disputes. Two court cases have been brought by the rival labor organizations for the very reason that the action of the Board has not settled the controversy. The First Division has never discussed the jurisdictional question here involved, or made a ruling thereon, in any award rendered by it.

(c) The argument that disputes of employees are or should be assigned to the various divisions of the National Railroad Adjustment Board according to some scheme of the related work is contrary to the terms of the statute

and would in practice lead only to confusion. The work of yardmasters is closely related to the work of employees whose disputes are divided among all four divisions of the Board.

(d) The Fourth Division of the National Railroad Adjustment Board is neither in theory nor in actuality a marine body. The essence of its jurisdiction is generality, embracing all disputes not expressly assigned to the first three divisions. In practice, the work of the Fourth Division has been almost wholly in the railroad field, and petitioners' suggestion that its members are inexperienced or incompetent to deal with yardmaster disputes is not supported by the facts.

ARGUMENT.

Foreword.

The plan of the argument that follows is first to state and support the District Court's construction of the statute, and then to show that both courts below properly rejected each of the reasons advanced by petitioners for a different conclusion.

Petitioners' arguments are all designed to create doubt over the meaning of the statutory language. They assume to resolve such doubt by argument concerning the intent of Congress, which is said to be indicated by the structure of antecedent machinery for the adjustment of disputes, by administrative interpretation, and by the relationship between the work of yardmasters and yard-service employees. Those considerations, which are discussed in other sections of this brief, were carefully weighed by the courts below and found to yield nothing of value. They would be appropriate in any event, we suggest, only as an aid to the construction of a vague or ambiguous statute. In defining the jurisdiction of the First Division the statute uses a term not of common and general usage, but a trade term, admittedly current among and familiar to railroad men. The testimony established without dispute that that term has long had a particular and well-defined meaning in the trade from which it was taken. R. 191, 196, 197, 211. That being so, the problem of the District Court was to ascertain as a matter of objective fact whether, in the language of the railroad business, yardmasters are included within the term "yard-service employees." That is what the court did, as his opinion shows.

The only disputes subject to the First, Second, and Third

Divisions are those that are expressly assigned to those divisions; all other disputes go to the Fourth Division. The statute does not refer to yardmasters by name in the designation of crafts of employees whose disputes are embraced in the jurisdiction of the First Division. The decisive question in the District Court, therefore, was whether yardmasters were included within the statutory term "train- and yard-service employees." If so, their disputes would be found subject to the jurisdiction of the First Division, for that division hears

> "disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen and yard-service employees."[1]

But if yardmasters are not included within the term "train- and yard-service employees," their disputes must be submitted to the Fourth Division, which hears

> "disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, *and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions.*"[1]

The decision below was adverse to petitioners, and they complain, not only of the conclusion of the District Court, but of the method followed by the court in resolving the controversy. It may be useful, therefore, to state very briefly at the outset what the respective parties offered to assist the court in a determination of the meaning of the jurisdictional words of the statute.

The parties entered into a stipulation (R. 155-188) describing a railroad yard and the work performed there, identifying the classes and crafts of employees who work in the yard, and the duties of yardmasters. Petitioners' case-in-chief consisted only in the submission of that stipulation.

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[1] Section 3 First (h), 45 U. S. C. § 153 First (h).

Respondents then offered direct evidence, both oral and documentary, on the meaning of the railroad term "yard-service employees." First, they produced three veteran railroad officers who testified in the presence of the court and were cross-examined by the adverse parties. Each of these witnesses had come up through the ranks, and on the basis of long and extensive experience testified on the meaning of the railroad term "yard-service employees." The trial court had full opportunity to weigh the value of this evidence.

Secondly, respondents placed before the court a large volume of documentary evidence to show that the term "yard-service employees" as used day in and day out in the railroad business does not mean or include yardmasters.[1] This evidence was taken from the literature of the industry, and especially from documents written by the labor organizations themselves. By its very nature it shows how railroad people use the term in their everyday work when they are speaking or writing under circumstances entirely unconnected with this case.

In rebuttal, petitioners then called one witness who testified on the meaning of the statutory term in question and the manner in which disputes of yardmasters were adjusted prior to the enactment of the 1934 statute, and two witnesses who testified with reference to "the promotion from yard-service employee to yardmaster." R. 218, 220. Petitioners also offered certain documents relating to adjustment boards prior to 1934 and other material bearing upon an alleged administrative interpretation of the present statute.[1]

It will be seen that the petitioners did not approach this case in the District Court as one in which the meaning of

[1] By stipulation, the exhibits of all parties introduced at the trial have not been reproduced in the printed record but have been transmitted from the Circuit Court of Appeals to the Clerk of this Court as a part of the record.

a certain trade term used by Congress was to be sought by direct evidence of its actual use in the field from which it was taken, and the statute then applied accordingly. Instead, they went to sources outside the language of the statute, seeking to establish an intent of Congress that would override the plain meaning of that language. The District Court chose the direct approach; it found the intent of Congress in the language of the statute. Petitioners' suggestions that the intent of Congress be drawn from extraneous sources rather than the words of the Act were fully considered by the court, but were rejected. They were rejected because they did not show any legislative intent and because, on the other hand, the direct evidence clearly established the meaning of the jurisdictional words.

I.

Yardmasters Are Not "Yard-Service Employees."

A railroad yard is a defined area, containing a system of tracks, within which trains are made up and broken up and cars are received from shippers and delivered to consignees. A great volume of other work is done in the yard area. Various and voluminous records are made, an elaborate signal and communications system is operated, freight is checked and weighed, cars are repaired, and the entire physical plant is constantly maintained. The yardmaster directs and supervises all the work done within the limits of the yard, and is in charge of all the many classes and crafts of employees who work in the yard, including the road-service employees so long as the trains operated by them are within the limits of the yard. R. 162-169.

Several points that are of the utmost importance in their bearing on the railroad meaning of the decisive term are established by the stipulation, or by admission otherwise, as follows:

1. The men who actually make up and break up trains in the yard are known as yardmen, yard crews, or yard-service employees, and in the language of railroad men these three terms are in all respects equivalents and have the same meaning. Petitioners' witness Nemitz testified on cross-examination as follows (R. 212):

> "Q. * * * Let me ask you this, first: Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance 'yard service employees' and 'yardmen' and 'yard crews' generally speaking mean the same thing?
> "A. Yes, sir."

2. The stipulation itself observes the distinction between the yardmasters who supervise the handling of the trains and the yardmen who perform that work, in the following language (R. 162):

> "The work performed in a yard includes switching, making and breaking up trains, storing cars, moving trains into, out of, and through the yard, inspecting cars and freight, repairing cars, maintaining track and other fixed equipment, sending and receiving messages by telephone and telegraph, keeping records, and making reports. The employees who perform such work include those known as yardmen, that is, switch or yard foremen, yard helpers, and switch-tenders, and employees in train and engine service, such as engineers, firemen, hostlers, conductors, brakemen, flagmen, and baggagemen; they also include clerks, telephone and telegraph operators in yard offices, towermen operating interlocking switches, maintenance-of-way foremen and laborers, signal department forces engaged in the maintenance of yard signal plants, and car inspectors and repairers. *All such yardmen and other employees performing work in a yard are directed and supervised in their work by a yardmaster*, with the aid, if necessary, of one or more assistant yardmasters. *Yardmasters do not and may not perform the work of yardmen* and employees in train and engine service; they may perform some

clerical work, if their entire time is not taken up with the direction and supervision of yardmen and other employees working in yards."

3. The yardmaster also directs and supervises the work of many classes or crafts of employees who work in the yard but are not yard-service employees. For example, all road-service employees while on duty within the confines of the yard, the employees who check and weigh the freight, who repair the cars, who operate the signal and communications system, who maintain the property, and who make records and perform various clerical services. Petitioners were obliged to admit that such employees, although performing services in the yard, are not yard-service employees in the parlance of railroad men, and that the statute assigns the disputes of many such employees, not to the First Division, but to other divisions. Petitioners' witness Nemitz, testified further as follows (R. 213):

"Q. * * * In other words, you are not telling the court that you think, for example, that these clerical people that work in the yards, or car checkers, the weighmasters, or clerks, you don't think of those as yardmen, do you?

"A. No, sir.

"Q. So that the terms 'yard service employees,' and the equivalent terms, 'yardmen' and 'yard crews,' they don't include all of the men that work within the yard, or within the switching limits, do they?

"A. They would not include such as the storekeepers, or the section men, or perhaps other brakemen [trackmen], or clerks, and so on."

THERE WAS NO CONFLICT IN THE TESTIMONY AS TO THE MEANING OF THE TERM "YARD-SERVICE EMPLOYEES."

The respondents' first witness, an executive of the Indiana Harbor Belt Railroad Company, which has approximately 45 miles of line and six yards, and employs approximately 60 yardmasters and hundreds of yard-service em-

ployees (R. 190, 192), testified, on the basis of more than forty years of railroad experience, that common usage in the industry confines the term "yard-service employees" to the following (R. 191):

> "It refers to certain employees who make up and break up trains in yards within defined limits.
>
> "They also do other switching of cars, placing and pulling of cars at industries within those yards; namely, engineers, firemen, conductors or engine foremen, yard brakemen, switchmen or helpers, as they are termed."

The witness further testified that, in railroad usage, yardmasters are not referred to as yard-service employees, and that that term is merely another name for the employees who are also referred to by the terms "yardmen" and "yard crew." R. 191. With that statement petitioners' witness agreed unequivocally, as shown above (p. 15).

The two remaining witnesses offered by the defendants, a superintendent of terminals for the Milwaukee Road (formerly a yard clerk and a yardmaster), and an assistant manager of personnel for the Southern Pacific (formerly a yard clerk, brakeman, conductor, and trainmaster), corroborated the testimony of the first witness on the actual railroad usage of the disputed term. R. 195-199.

Testifying on rebuttal, petitioners' witness Nemitz confirmed in explicit terms the testimony of respondents' witnesses that the statutory term "yard-service employees" has a definite and well-defined meaning in the railroad business, and stated the trade meaning of the term in substantially the same language as that used by the witnesses for defendants. R. 211. The witness then went on to indicate a difference of opinion on the proper classification of yardmasters under the statute, an opinion which he repeated and elaborated on cross-examination with the ex-

planation that it was based upon the fact that in the past certain boards had heard disputes of both yardmasters and yard-service employees if they were members of the same labor organization. R. 211, 213-214.[1] This witness testified on direct examination as follows (R. 211):

> "Q. Mr. Nemitz, I will ask you whether or not as a result of your experience, both as an active worker for railroads, and as a result of your experience in the last twenty-five years in the various capacities which you have described, whether or not the yard service employees among railroad men has any particular or well defined meaning or understanding?
>
> "A. They have, yes. Usually they are considered men who work within the switching limits, or certain defined limits, generally referred to as switchmen, [sic] or yard limits. They perform a service such as placing cars at different industries, supplying cars of different kinds at different places within those switching or yard limits, and making up and breaking up trains, that is, they break up the incoming trains and they make up the outgoing trains, fixing them in their regular order for the handling by road crews, who will take them from one terminal to some other terminal, or some other point outside of the yard limits or switching limits."

His counsel then put to him the direct question (R. 211):

> "Q. What would you say as to whether or not the class or craft of yardmasters is generally understood to be included within the term or expression of 'yard service employees'?"

The witness replied (R. 211-212):

> "A. I would say that *they fit more nearly in with the yard service employees than with any other class.* They don't belong in the road service. They have no rights there. They don't belong in the clerical department. They have no rights there. Usually the yardmasters hold rights as yard foremen [conductors], or

[1] This statement of the petitioners' historical argument we discuss in another section of the brief.

as yard helpers in some yard on the railroad, where they hold rights as yardmaster, and where they perform services as yardmasters."

It would have been difficult for the witness to emphasize more pointedly the fact that yardmasters are a separate, independent craft.[1]

Both sides thus agreed that the jurisdictional words that the court was asked to construe had a common, well-defined meaning in the railroad business. The testimony of petitioners' witness on that meaning did not contradict the testimony of respondents' witnesses, but actually supported it.

The District Court in its memorandum opinion stated (R. 226):

"Three witnesses testified that among railroad operatives the term yard service employee did not include yardmasters. The one witness who testified for plaintiffs did not deny this. All he said was that 'they fit more nearly in with the yard service employees than any other class.' That certainly is not a statement they are members of that class. It implies that they are not, that they are not in any class mentioned in the statute but are more nearly related to the class of yard service employees than any other class. Clearly as to the direct evidence introduced on this subject the preponderance is against the plaintiffs."

The Circuit Court of Appeals stated in its opinion (R. 274):

"The testimony of all the witnesses did not differ

[1] The petitioners' brief in the District Court likewise expressly differentiated yardmasters from all other employees, in the following language:

"Yardmasters constitute a separate craft or class of employees and agreements covering rates of pay, rules and working conditions under which they operate on several railroads throughout the United States are filed with the National Mediation Board under the provisions of Section 155 (e) of the Railway Labor Act, as amended."

materially with respect to the definition of 'yard-service employees' as used by those engaged in the railroad business, and the court's finding adopted that definition. True, plaintiffs' one witness stated: 'I would say that they (yardmasters) fit more nearly in with the yard-service employees than with any other class.' However, he did not deny the accuracy of the definition of the terms 'yard-service employees' as given by all other witnesses testifying on this subject."

RESPONDENTS' DOCUMENTARY EVIDENCE OF THE MEANING OF THE RAILROAD TERM EMBRACED IN THE STATUTE.

The second type of evidence submitted by respondents at the trial consisted of a large number of documents showing the distinction that is observed in the everyday language of the industry, between the terms "yardmasters" and "yard-service employees," as used by railroad labor organizations, the carriers, and various administrative agencies. This type of evidence has the special merit of showing the habitual and candid railroad usage of these terms under circumstances quite unconnected with this case, or with the controversy that gave rise to the case.

It is important to a proper appraisal of this evidence to bear in mind that both sides agree that the terms "yard-service employees" and "yardmen" are synonymous. The respondents' witnesses so testified, (R. 191, 196, 197) and petitioners' witness Nemitz agreed (R. 212):

"Q. * * * Can you agree with the witnesses who were on the stand this morning, at least to this extent, that in railroad parlance 'yard service employees' and 'yardmen' and 'yard crews' generally speaking mean the same thing?

"A. Yes, sir."

The stipulation itself contains the following significant statement (R. 162): "Yardmasters do not and may not perform the work of yardmen * * *."

The first illustration of customary railroad usage to which we shall refer was supplied by one of the petitioners in another connection. Award 4548 of the First Division (included in Plaintiffs' Exhibit K) was made in a dispute between the Order of Railway Conductors and the Elgin, Joliet and Eastern Railway Company. On the first page of the report of the award, under the heading "Position of Employes," the Order of Railway Conductors states that in 1934 the Railway Company

> "took over the **employes in yard service** *and the yardmasters* employed by the Standard Oil Company."

The Order of Railway Conductors spoke in this way because yardmasters are not regarded as "employes in yard service." If yardmasters were so regarded, the Order of Railway Conductors would have omitted special and separate mention of that class of employees.

Apart from the present case the Order of Railway Conductors has been consistent in its use of "yard-service employees" as a term not including yardmasters. In Docket 6406, First Division, *Order of Railway Conductors* v. *Chicago and North Western Railway Company,* the submission filed by the Conductors (Defendants' Exhibit 3) states the case of one Dunleavy, who was first employed as a brakeman, then as a conductor, and was finally *promoted* to yardmaster in the Wood Street yard, but thereafter, when that yard was closed down,

> "was required to *revert back* to yard and/or road service * * *."

The distinction observed by the Order of Railway Conductors between yardmasters and yard-service employees, and between the work of yardmasters and the work constituting yard service, has also been regularly observed by the other petitioner in No. 63, the Brotherhood of Railroad Trainmen. In Docket 6837, First Division, *Brotherhood of Railroad Trainmen* v. *Chicago and North Western*

Railway Company (Defendants' Exhibit 3-A), the joint statement signed by a division superintendent of the Railway Company and a local chairman of the Brotherhood of Railroad Trainmen refers to *Yardmaster* Brazier, who displaced *Yardmaster* Meister,

> "'who in turn *returned to yard service* thus throwing Humm [a yardman] on the extra board.'"

The Brotherhood of Railroad Trainmen has been most zealous, apart from the present case, in insisting that yardmasters are not yard-service employees or yardmen, that the latter are entitled to all yard service, and that a yardmaster has no right to encroach upon their preserve. Defendants' Exhibits 1, 1-B, 1-C, 1-E, 1-F, and 1-G are cases before the First Division in which the Brotherhood of Railroad Trainmen has advanced these propositions, using language that unmistakably excludes yardmasters from the term "yard-service employees" or its equivalent, "yardmen."

Thus, Award 2065, First Division, related to a dispute between the Brotherhood of Railroad Trainmen and the Southern Pacific Company over the use of *"supervisory forces"* to perform *"yard service,"* and upon examination it turns out that the members of the "supervisory force" referred to by the Trainmen were *"Yardmasters* and other Supervisory force." Defendants' Exhibit 1-B, p. 1.

Award 4466, First Division, related to a dispute between the Brotherhood of Railroad Trainmen and the Terminal Railroad Association of St. Louis over "use of yardmasters to perform the duties of yardmen." Defendants' Exhibit 1-E, p. 1.

The dispute settled by Award 5816, First Division, *Brotherhood of Railroad Trainmen* v. *Missouri-Kansas-Texas Railroad Company*, was "account yardmaster performing *service for which yardmen are employed*" (De-

fendants' Exhibit 1-F, p. 1), and in the "Position of Employes" the Brotherhood of Railroad Trainmen made the following claim (Defendants' Exhibit 1-F, p. 2):

> "The Committee holds that the scope of the agreement *defines the class of employes known as yardmen, separating them from other classes of employees* for the purpose of entering into agreements covering rates of pay, rules and working conditions applicable to yard switching.
>
> "If it is the intent of the agreement to permit the Carrier to parcel its yard switching to *employes other than yardmen* there would be little need of a rule defining, classifying and separating yardmen from other employees.
>
> "We submit that the Carrier's agreement with its yardmen involves valuable property rights in the form of seniority to its yardmen who should be given all yard work within the confines of their designated seniority territory. It is evident the Carrier declared definite intent of recognizing seniority rights of yardmen to all yard switching service when it entered into agreement with this Organization defining and classifying them as yardmen with established rates of pay and other rules designating and establishing segregated districts for yardmen to work and exercise seniority rights. *To construe such agreement as embracing less than all the yard service would render its yardmen's seniority rights and the current agreement of little or no value,* as the Carrier could parcel its yard switching to other groups of employes with the consequence that there would finally be nothing left which would be subject to the agreement with its yardmen."

In the submission leading up to Award 7355, First Division, *Brotherhood of Railroad Trainmen* v. *Texas and Pacific Railway Company*, the Trainmen accused yardmasters of performing specified items of "yard service." Defendants' Exhibit 1-G, p. 1.

The position taken by the plaintiff labor organizations has also been taken by the Switchmen's Union of North America. See Defendants' Exhibit 1-A.

As one would expect, the carriers use the same language as the labor organizations, for in practice there has never been any dispute in railroad circles over the meaning of the term "yard-service employees." In Docket 11801, First Division (Defendants' Exhibit 3-B), the submission of the Brotherhood of Railroad Trainmen states that one Thomas Estle worked as a "helper and/or foreman [conductor] in charge of a crew in yard service" until he was made a yardmaster, and the Soo Line, in its submission, goes on to state that thereafter the yardmaster force was reduced and Estle

> "*returned to yard service* as a foreman and helper."

In Award 3609, First Division, *Brotherho l of Railroad Trainmen* v. *Baltimore & Ohio Railroad Company*, the carrier's statement (Defendant's Exhibit 1-D, p. 3) speaks of certain yardmen who had been promoted to yardmaster positions and then, as a result of a reduction in the yardmaster force,

> "*returned to yard service* in the exercise of their seniority rights under the Trainmen's Agreement."

The members of the First Division have in numerous cases repeatedly used "yard-service employees" in a sense exclusive of yardmasters. Award 2065, as mentioned above (p. 19), settled a case in which the Trainmen complained of the use of "Yardmasters and other Supervisory force" to perform "yard service." The "Findings" of the First Division (Defendants' Exhibit 1-B, p. 36) contain the following language:

> "This Division has rendered many awards denying Carriers the right to use supervising officers or others to perform the work of yardmen • • •.

> "In the light of the consolidation agreement • • • that three yardmen should have been continued in service as herders, it is clear that *the yard service employes* involved in this dispute were deprived of service to which they were entitled and would have enjoyed had *supervisory forces* [that is, yardmasters] not been used to perform herders' work instead of yardmen."

See also Awards 1464, 1728, 3055, 4466, 5816, and 7355, all in the First Division (Defendants' Exhibits 1, p. 2; 1-A, p. 5; 1-C, p. 5; 1-E, p. 6; 1-F, p. 5; and 1-G, p. 35), in which the First Division in its "Findings" used the same or substantially the same language as that just quoted.

The essential distinction between yardmasters and yard-service employees, in terms of the *supervisory service* performed by the first and the *yard service* performed by the second, was observed by the Fourth Division in the following passage in its opinion in Award 67, *Louisville and Nashville Railroad Company* v. *Railroad Yardmasters of America* (Defendants' Exhibit 1-H, p. 7):

> "During the period of construction of the Kentucky and Virginia Railroad, yard service under the supervision of a yardmaster was first established at Page, Kentucky, and later, when the line was built through to Lynch, Kentucky, yard service was established at Chad and Lynch, Kentucky, under the supervision of yardmasters located at Cumberland, Kentucky."

We submit that there is and can be no answer to the showing made as to the true meaning of the term in question by the objective, disinterested, everyday usage that appears in these submissions by the employee organizations and the carriers and in the findings of the carrier and labor members of the First and Fourth Divisions of the National Railroad Adjustment Board.

We are able to refer the Court also to the language and the practice of the Interstate Commerce Commission in this

connection. Illustrations of the Commission's use of "yard service" and "yard-service employees" are found in its report in *Ex Parte No. 106, Six-Hour Day Investigation*, 190 I. C. C. 750 (1932). Speaking of the Adamson Act, 39 Stat. 721, the Commission said (Defendants' Exhibit 2):

> "*Employees in road and yard service* • • •.[1] In practice the provisions of that act have been applied to engineers, firemen, conductors, hostlers, baggagemen, brakemen, and flagmen in road and yard service."

The Commission gives its own definition of "yard-service employees" in referring to certain rules

> "applying to yard service employees—train and engine service, switch tenders, hostlers and hostler helpers— • • •."

Petitioners stress the fact that "for long years the Interstate Commerce Commission has *grouped* yardmasters with the road and operating crafts."[2] Operating employees *must* be in road service or yard service, the petitioners say, and since yardmasters are not in road service they inevitably fall into yard service. This kind of logic ignores the facts. The terms "road service" and "yard service" developed with reference to men handling equipment on the road and in the yards, as a natural and necessary distinction between crews (conductor, engineer, fireman, and brakeman) working under two different sets of conditions and being paid on two different bases. R. 191. The Interstate Commerce Commission does not classify yardmasters as yardmen or yard-service employees. The material cited by petitioners merely has reference to the reporting of statistical information.

The rules to which petitioners refer (p. 41 of their brief) have been in effect since 1921, when the Commission issued

[1] Italics not added.

[2] But see n. 1, p. 16, *supra*.

an order with annexed rules entitled "Rules Governing the Classification of Steam Railway Employees and Reports of Their Service and Compensation." See Intervenor's Exhibit 6, first page (unnumbered). These rules set up forms for reports, on which the various classes of employees are arranged according to so-called Reporting Division. Same Exhibit, numbered pages 6-11.[1] Explanatory instructions pertaining to the forms stated that the Reporting Divisions were to be in accord with the definitions of such Divisions given in the *Classification and Index of Steam Railroad Occupations* prepared by the United States Railroad Labor Board. Intervenor's Exhibit 1.

The classification to which reference is made appears in Intervenor's Exhibit 1. This classification divides all railroad employees into so-called "Services." Yardmasters and yardmen are not in the same service. The yardmaster group is found under "Supervisory Skilled Trades and Labor Service," in which "the preponderant duties of incumbents are to supervise or to assist in supervising the work of subordinate foremen and other employees * * *." Intervenor's Exhibit 1. Yardmen, or yard-service employees, are found in a distinct service called "Train and Engine Service," in which the duties are "to operate or to assist in the operation of trains and engines in road and yard service; or to handle locomotives in and around yards and engine houses when not in road or switching service." Intervenor's Exhibit 1. The employees known generically as yard-service employees are listed under the Yard Conductor and Yard Foreman Group, the Yard Brakeman and Yard Helper and Switchtender Group, the Yard Engineer and Motorman Group, the Yard Fireman

[1] By an order of July 17, 1940, effective August 1, 1940, new numbers were assigned to the Reporting Divisions, but the method of reporting railway wage statistics was not changed. Intervenor's Exhibit 6, first two pages (unnumbered).

and Helper Group, and the Hostler Group. Intervenor's Exhibit 1.

Of course, the very reason why crafts of employees and things that differ, one from another, acquire different names and designations is that the use of such distinctive tags is an imperative necessity in everyday speech. We have already mentioned the historic distinction between "road service" and "yard service" (*supra*, p. 26). That alone would perhaps be sufficient to account for the development of the term "yard-service employee." But there is another cogent reason for the term. The men who actually handle the cars and trains in the yards, and the men who supervise not only that work, but all of the manifold activities in the yard, are in distinct crafts with entirely different duties and rights. In carrying on the business of the industry it is constantly necessary to differentiate between the two crafts. The use of the term "yard-service employees" to designate those who make up and break up trains in the yards, as distinguished from the yardmasters who supervise that and all other work in the yard, was born of that necessity and had become a part of the language of the business long before Congress used the term in the statute. The documentary evidence proves it.

A striking example of how deeply this distinction is ingrained in the thought and speech of railroad people, and how unconscious its use has become, is to be found in the examination of one of petitioners' witnesses by the regular and experienced attorney for the petitioning labor members of the First Division (R. 217-218):

"Q. By whom are you employed?
A. Chicago, Milwaukee & St. Paul Railroad.
Q. In what capacity?
A. Yardmaster.
Q. How long have you been in that position?

A. About three years.

Q. *Prior* to that time, were you engaged by that railroad in the yards *as a yard service employee*?

A. Yes, sir.

Q. Then *subsequently* you were *promoted to* the position of *yardmaster*, which you now occupy?

A. Yes, sir.

Q. I will ask you whether or not **the promotion from yard service employee to yardmaster** is in accordance with the scheduled agreement in effect on the property of that carrier?

A. Yes, sir."

This illustrates the process by which trade terms are created and come into everyday use, from which they eventually find their way into statutes. Even in the trial of the case petitioners were unable to avoid constant recognition of the very meaning of the term that they are seeking to defeat.

The documentary material offered by petitioners to show the meaning of the term "yard-service employees" (pp. 37-47 of their brief) has been assembled by them since the trial of the case in the District Court. Respondents introduced both oral and documentary evidence on that point at the trial, but petitioners produced only one witness on rebuttal and no documentary evidence for the purpose of showing the meaning of the term. Petitioners brought and tried this case primarily on the implicit premise that yardmasters, while not actually yard-service employees,[1] should nevertheless be required to submit their disputes to the First Division because, as their witness put it, "they fit more nearly in with the yard service employees than with any other class." R. 211. Their introduction of illustrations of alleged railroad usage in the appellate stages of this case was an afterthought.

With one single exception, the petitioners' claimed illus-

[1] See n. 1, p. 16, *supra*.

trations of usage are not primary sources taken from the language of the men who developed the terms in question—"yard service," "yardmaster," and "yardmen" or "yard-service employees." The material is of secondary character; it shows, not actual use of those terms in their native setting as a demonstration of their content and respective limitations, but various classifications or groupings of railroad employees for convenience in the presentation of statistics and other purposes. The examples generally are not taken from the language of the yard itself, but from the language of outsiders, and in the one exception the petitioners have misquoted the original document.

At pages 40-41 of their brief petitioners cite the Index Digest to the Awards of the First Division. One of the headings in that digest is, of course, "Yard Service," and under that heading is a subheading entitled "Yardmasters." This is offered to prove that yardmasters are regarded and referred to ordinarily as yard-service employees. Among the thirty other subheadings under "Yard Service," along with "Yardmasters," are the following: "Road Crews—Switching or Other Work in Yards" and "Road Service." Is it to be inferred, then, that road crews are also yard-service employees?

Examination of the awards listed under the subheading "Yardmasters" shows the reason for its inclusion in the index under the heading "Yard Service." Awards 5204, 5205, and 5206, for instance, are described in the Index Digest dated March 1, 1941, under the subheading "Yardmasters," (p. 347) as "Claims of brakemen and yardmen account *other than train or yard service employees* performing switching." The published awards show that the employees designated as *"other than train or yard service employees"* were *yardmasters* and *yard clerks*. The petitioners' example therefore proves the very opposite of their contention.

Petitioners refer to General Order No. 27 issued by the Director General of the Railroads, relating to the pay of "footboard yardmasters" when acting as substitutes for yardmasters (pp. 46-47 of their brief). The essential thing about "footboard yardmasters" is that they are not yardmasters, as the petitioners' quotation itself shows. The term is ironic. A "footboard yardmaster" is a yard foreman (also known in some sections of the country as engine foreman or yard conductor), who is the yardman immediately in charge and a member of the yard crew that handles trains and cars in the yard. The disputes of such an employee are referable to the First Division by specific assignment in Section 3 First (h) of the Act. It is a labored effort, indeed, to draw yardmaster disputes into the First Division by a nickname applied to conductors.

We have already shown (*supra*, pp. 26-28) that the Interstate Commerce Commission material relied upon by the petitioners does not support their contention and that the Commission classifies yardmasters for reporting purposes in the "Supervisory Skilled Trades and Labor Service" and classifies yard conductors or foremen, yard brakemen or helpers, switchtenders, yard engineers and motormen, yard firemen and helpers, and hostlers in "Train and Engine Service."

A number of the petitioners' examples (pp. 45, 46, and 47 of their brief) are nothing in substance but references to the petitioner organizations as representatives of train- and engine-service employees in road and yard service, including [that is, including in their membership] the yardmasters on a few roads. Such references, according to petitioners, put yardmasters into the class of yard-service employees. By the same token, a few stationmasters who belong to the Railroad Yardmasters of America are yardmasters.

The three-page effort to show (pp. 37-40 of petitioners' brief) that the National Mediation Board classifies yardmasters as yard-service employees can not conceal the fact that the tables on which the petitioners rely were discontinued after the Third Annual Report and have been replaced in all subsequent annual reports (1938, *et seq.*) by tables in which yardmasters are shown as a class separate from the class of yard-service employees—that is, "yard foremen, helpers, and switchtenders"—with which some anonymous statistician employed by the Board had originally lumped them.

Petitioners quote at length from the report made by an Emergency Board on the 1943 wage dispute (p. 44 of their brief). That dispute involved only the members of the petitioner organizations and three other organizations, the so-called Five Operating Brotherhoods, and the authors of the report expressly confined their remarks to the employees involved, the vast bulk of whom were train- and engine-service employees on the road and in the yards. The Railroad Yardmasters of America were not involved, hence neither were yardmasters in general. The report went on to say, a few lines after petitioners stopped quoting:

> "The railroad labor organizations involved in this case [previously characterized as 'train and engine and yard service employees' and 'operating employees' engaged in 'road service' and 'yard service'] *also* represent a few *other* relatively small groups of railroad employees on some or all of the carriers. These groups include sleeping car conductors, dining car stewards and chefs, *and yardmasters who perform supervisory duties in the yards and terminals of the railroads.*"[1]

[1] Report to the President by the Emergency Board, appointed May 31, 1943, pursuant to the Railway Labor Act and Executive Orders 9172 and 9299, dated September 25, 1943, p. 12.

In the same report Table I, at pages 13 and 14, shows basic daily wage rates for locomotive engineers, firemen, helpers, hostlers, and hostler helpers, and two subdivisions of the table are devoted to "Yard Service," in one of which the wages of engineers, firemen, and electric helpers are shown, and in the other the wages of yard foremen (conductors), yard helpers (brakemen or switchmen), and switchtenders. Yardmasters do not appear.

At page 15 the authors of the report (Messrs. Walter P. Stacy, I. L. Sharfman, and Frank M. Swacker) recognize the basic distinction between road service and yard service that we have heretofore pointed out (*supra*, p. 26):

> "Railroad train employees are paid in one of two general ways, depending upon whether they are engaged in yard service or in road service. In yard service, employees are ordinarily paid by the day for an eight-hour day. * * * Workers employed in road service, on the other hand, are paid on the so-called dual basis of pay, involving both hours and mileage."[1]

At page 31 of the report, Table II shows the average hourly earnings of 22 classes of train and engine and yard-service employees. Yardmasters are not included. The table is totalled: "All train and engine service employees—22 classes."

The petitioners' one remaining example (p. 46 of their brief) is taken from a statement of a dispute submitted to an early adjustment board back in 1929. This is petitioners' only illustration of true railroad usage, by which we mean usage of the term by railroad men who actually conduct the railroad business, the men who developed the meanings of the terms "yard service" and "yard-service employees" that were current when the 1934 Act was passed and were adopted by Congress in writing the statute.

[1] Yardmasters are ordinarily paid by the month.

This example speaks of certain yardmasters having been employed "*for* yard service." The meaning of the passage, especially the use of the word "for," is not clear, and it certainly is not evidence that yardmasters are embraced *within* the term "yard-service employees" in ordinary and general railroad usage. We note that in petitioners' quotation in their brief the words "*for* yard service", which appear in the original, have been changed to read "*in* yard service." See Case No. 2948 in Plaintiffs' Exhibit J.

The secondary type of evidence on which petitioners are compelled largely to rely is inherently untrustworthy for the purpose at hand, and the contrast between such evidence, diffuse and never quite to the point, and the evidence submitted by respondents, taken direct from the language of railroad men and demonstrating concisely the actual and customary use of the very terms in question, is significant.

In *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364 (1926), the Supreme Court had under consideration the nautical term "divided into watches," as used in the Seamen's Act of March 4, 1915. In support of its conclusion on the meaning of that term, the court said (pp. 370-371):

> "In this conclusion we are fortified by the consideration that the legislation deals with seamen and the merchant marine and, consequently, the phrase 'divided into . . . watches' is to be given the meaning which it had acquired in the language and usages of the trade to which the Act relates, in accordance with the rule stated in *Unwin* v. *Hanson*, [1891] L. R. 2 Q. B. 115, 119: 'If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the

common or ordinary meaning of the words.' In the understanding of the sailor, a division into 'watches,' as applied to the personnel of the ship, connotes a division as nearly equal as possible."

The court then referred to a marine encyclopedia and a dictionary of sea terms, in which the term in question was either used in such a way as to indicate its meaning or was expressly defined.

We refer also to *General Petroleum Corp.* v. *United States*, 24 F. Supp. 285, 286 (D. C. S. D. Cal., 1938), in which the court said:

> "Words do not become a part of language unless they get themselves accepted as a part of the everyday speech of man. Technical words, of course, are given the technical significance which their acceptance by a particular craft or group has conferred upon them."

See also *Hoffman* v. *Palmer*, 129 F. (2d) 76, 984 (C. C. A. 2, 1942) and *Massachusetts Protective Ass'n.* v. *United States*, 114 F. (2d) 304 (C. C. A. 1, 1940).

In the "everyday speech" of railroad men, yardmasters are not referred to as yard-service employees, and the direct and primary evidence on the point, both oral and documentary, proves that the term "yard-service employees" has a clear "technical significance" that does not include that supervisory craft.

As indicated by the testimony of their witness, Nemitz, petitioners did not actually contend in the District Court that the craft of yardmasters are within the specific statutory designation "yard-service employees."[1] Their primary contention was, instead, that disputes involving yardmasters, even though not specifically assigned to the First Division, should be held to be within the jurisdiction of that division (1) because historically, so the petitioners

[1] See also n. 1, p. 16, *supra*.

say, disputes involving yardmasters and disputes involving yard-service employees were considered by the same adjustment board prior to 1934, (2) because since 1934 there has been a settled administrative interpretation by the National Railroad Adjustment Board that the First Division has jurisdiction of disputes involving yardmasters, and (3) because yardmasters and yardmen both work in the yard and are, obviously, engaged in related lines of work. We shall discuss these several contentions in the order in which they are stated.

II.

The Historical Background of the National Railroad Adjustment Board Impeaches Petitioners' Construction of the Statute.

The Trainmen and Conductors find no support for their position in the history of the adjustment of disputes prior to the enactment of the present statute. The disputes of yardmasters and yard-service employees in general were not, as petitioners suggest, submitted to the same board. Disputes involving the single craft of yardmasters were not even submitted to one and the same board. It was the inadequacy of the previous system that led to the very different procedure established by the 1934 amendments.

The history of the submission of disputes down to the present time is divisible into four periods: (1) Federal control, 1918-1920; (2) Transportation Act of 1920, 1920-1926; (3) Railway Labor Act, 1926-1934; (4) and Railway Labor Act as amended, 1934 to the present.

(1) *During federal control (1918-1920).*

Each of the three Railway Boards of Adjustment created under the United States Railroad Administration was established by an agreement between a Regional Director of the Railroads, who stood in the place of management, and certain labor organizations. The agreements became effective upon approval by the Director General of the Railroads.[1] By their terms, the agreements were limited to the employees, regardless of their class or craft, who were members of the signatory organizations. Classes or crafts of employees were not included as such. The jurisdiction of each board was defined in the agreements as follows:

> "Personal grievances or controversies arising under interpretation of wage agreements, and all other disputes arising between officials of the railroad and its employees, covered by this understanding * * *."[2]

The employees represented by the petitioners in this case were subject to the jurisdiction of Railway Board of Adjustment No. 1. The labor organizations parties to the agreement creating that board were as follows:

> Order of Railway Conductors
> Brotherhood of Railroad Trainmen
> Brotherhood of Locomotive Engineers
> Brotherhood of Locomotive Firemen and Engineers[3]

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[1] The agreements are set forth in full in a collection of source materials made by Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, entitled *Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board* (Book One), *Historical Background and Growth of Machinery Set Up for the Handling of Railroad Labor Disputes, 1888-1940* (Book Two).

[2] Op. cit. in n. 1, *supra*, Appendix to Book Two, pp. 21, 24, 28.

[3] Op. cit. in n. 1, *supra*, Appendix to Book Two, pp. 19, 20. The agreement was annexed to General Order No. 13 of the Director General of the Railroads, dated March 22, 1918, which created Railway Board of Adjustment No. 1.

If and to the limited extent that the petitioners had at that time any yardmaster members, disputes involving them were submitted to Railway Board of Adjustment No. 1, not because they were yardmasters, but because they were members of the agreeing organizations.

At the same time, there were other yardmasters who were subject to the jurisdiction of Railway Board of Adjustment No. 3, because the agreement establishing that board was signed by the Switchmen's Union of North America.[1] The members of that union are for the most part yard-service employees whose disputes are now subject to the First Division, but a few of its members are yardmasters. If and to the limited extent that the Switchmen had yardmaster members during the period of federal control, their disputes were heard by Board No. 3 for the same reason that disputes of the yardmasters, if any, then belonging to the Trainmen and the Conductors, were heard by Board No. 1.

Provision for adjustment of the disputes and grievances of employees, whether or not organized, but in any event not members of an organization joining in the creation of one of the three Railway Boards of Adjustment, was made as follows in Circular No. 3 issued August 30, 1918 by the Division of Labor of the United States Railroad Administration:

> "(c) When employees are represented by Railway Boards of Adjustment, the procedure as to all controversies within the scope of their duties will be as directed in general orders creating such boards. The fact that certain employees are not represented by Railway

[1] The other labor parties were the Order of Railroad Telegraphers, the Brotherhood of Railway Clerks, and the United Brotherhood of Maintenance-of-Way Employees. The agreement was annexed to General Order No. 29 of the Director General of the Railroads, dated May 31, 1918, which created Railway Board of Adjustment No. 3.

Boards of Adjustment will in no manner deprive them of any of the benefits accruing from such boards. An assistant to the Director of the Division of Labor has been appointed, and a staff of representatives has been organized, for the especial purpose of rendering the same service to such employees as though represented by a Railway Board of Adjustment. Boards of adjustment have been created by understanding with the larger organizations of employees for the convenience of handling such matters and to relieve the Director of the Division of Labor of adjusting same. It is not practicable to create Railway Boards of Adjustment, except for the larger organizations of employees."[1]

Circular No. 3 further provided in detail for the method of handling requests for adjustments in wages by "employees *not* represented by Railway Boards of Adjustment" and personal grievances or controversies arising under the interpretation of wage agreements and all other disputes arising "between officials of a railroad and its employees *not* represented by Railway Boards of Adjustment." If not settled on the property, such disputes were referable to the Director of the Division of Labor of the United States Railroad Administration.[2]

It is apparent that, during the period of federal control, the great bulk of railroad yardmasters, who were then, as now, *not* members of the petitioner organizations, did not submit their disputes to Railway Board of Adjustment No. 1; that yardmaster disputes could be heard by any one of three agencies; and that wherever yardmasters submitted their disputes, if any, they did not submit them as members of a particular craft, but merely as employees belonging, or not belonging, to particular labor organizations.

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[1] Op. cit. in n. 1, p. 37, Appendix to Book Two, p. 31.

[2] Op. cit. in n. 1, p. 37, Appendix to Book Two, pp. 31-32.

The scheme for the submission of disputes and grievances during the period of federal control offers no support whatever for the argument that yardmasters and yard-service employees have always been aligned together and that their disputes have always been heard by one and the same board. Jurisdiction to hear and decide all disputes during that period depended not upon a classification according to crafts or jobs, as it does now, but upon labor representation.

As a matter of historic fact, disputes and grievances involving yardmasters in the present sense of the term were practically if not wholly non-existent during the period of federal control. Yardmasters at that time were not generally considered "employees," much less "yard-service employees"; they were classed and treated as "officials." The United States Railroad Administration did not place yardmasters as a class of employees under the Supplements to General Order No. 27, dealing with the wages of railroad employees, although Section (a) of Article 2 of that order covered the percentage wage increase applicable to all railroad workers receiving up to $250 a month and therefore affected some yardmasters. Instead of dealing with yardmasters as a class of employees under the Supplements to General Order No. 27, the Director General of the Railroads separately authorized certain rates of pay and working conditions for yardmasters and ordered the Regional Directors to put them into effect.[1]

In contrast, several Supplements to General Order No. 27 related to yard-service employees as a class, or to particular crafts within that class. Supplement No. 22, for instance, dealt with the rates of pay of engine foremen (yard conductors) when acting as "footboard yardmasters"

[1] E. g., Supplement No. 6 to Circular No. 28, dated October 17, 1918, issued to the Northwestern Railroads by the Regional Director for the Northwestern Region.

(yard conductors performing certain extra duties ordinarily assigned to yardmasters and receiving extra pay therefor). In no sense was this Supplement intended to cover yardmasters as a class; it covered the class of engine foremen or yard conductors. Supplements Nos. 15, 16, 23, 24, and 25, with Interpretations and Addenda, covered yard-service employees. For example, Supplement No. 15 related to "Yard Service Article XII—Rates of Pay, Engineers, Firemen, Helpers"; Supplement No. 16 related to "Yard Service Article XII—Rates of Pay, Foremen [that is, yard conductors], Helpers, Switchtenders."

There is no showing in the record that the petitioner organizations had any active members employed as yardmasters during the period of federal control.

(2). *Under the Transportation Act of 1920* (*1920-1926*).

The Transportation Act of 1920, c. 91, 41 Stat. 456, superseded the arrangements set up during the period of federal control. Under this Act, adjustment boards were authorized to be created by agreement. Here again, as it was during federal control, the jurisdiction of any board so created extended only to the disputes of employees who were members of the organizations that joined with the carriers in setting up that particular board.[1]

[1] Title III of the Transportation Act of 1920 was captioned "Disputes between Carriers and their Employees and Subordinate Officials." Section 301 of the Act, under this Title III, provided that any dispute not decided in conference might be submitted to any board authorized by Title III to hear and decide it. Section 302 then provided that so-called Railroad Boards of Labor Adjustment might be established "by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof." Section 303 gave these Adjustment Boards jurisdiction to hear and decide "any dispute involving only grievances, rules, or working conditions" (not decided in conference as provided in Section 301) "between the

Two types of boards were set up under the Transportation Act of 1920. The first were system boards of adjustment, each confined to one railroad, which entered into an agreement or agreements with one or more classes of its employees creating a board of adjustment for that particular railroad system.[1]

The second were the Train Service Boards of Adjustment created by agreement for the purpose of handling the disputes of members of the four brotherhoods that had been represented on Railway Board of Adjustment No. 1, namely, the two that are petitioners in this case, Order of Railway Conductors and Brotherhood of Railroad Trainmen, and the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen. In lieu of one national board, three regional boards were set up. The brotherhoods entered into one agreement with certain carriers creating the Train Service Board of Adjustment for the Southeastern Region, August 15, 1921; into another agreement with certain other carriers creating the Train Service Board of Adjustment for the Western Region, August 25, 1921; and into a third agreement with still other carriers creating the Train Service Board of Adjustment (Eastern), November 9, 1921.[2]

The several organizations that represent 78% of the yardmasters (as shown in the table on page 5 of this brief) were not parties to any of the agreements just mentioned. It is apparent, therefore, that the only yardmasters

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carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of section 302, represented upon any such Adjustment Board." In a word, the jurisdiction of any Adjustment Board over a party to a dispute depended solely upon whether that party was *represented* on the Board.

[1] Op. cit. in n. 1, p. 37, Book Two, p. 407.

[2] Op. cit. in n. 1, p. 37, Book Two, p. 407, Appendix to Book Two, pp. 39, 43, 50.

and yard-service employees whose disputes could be heard by the Train Service Boards of Adjustment were those belonging to the four brotherhoods mentioned above, which included in their membership many yard-service employees but at that time comparatively few yardmasters, if any, and since many railroads employing members of the Trainmen and the Conductors were not parties to the agreements, the jurisdiction of the Train Service Boards of Adjustment did not even embrace all members of those brotherhoods. Participation in the creation of a board was the basis of jurisdiction. An employee would present his dispute to a particular board only if that board had been set up jointly by the labor organization of which he was a member and the carrier of which he was an employee. Furthermore, the fact that both the yardmasters, if any, and the yard-service employees belonging to those organizations could submit their disputes to the Train Service Boards of Adjustment was due solely and entirely to their membership in the organizations. The jurisdiction of the Train Service Boards was thus definitely not based on a classification by work or crafts, and by no stretch of the imagination could it be said that it was based on an administrative or trade interpretation of the term "yard-service employees" as being inclusive of yardmasters.[1]

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[1] The jurisdictional provisions were the same in all three of the regional agreements covering the members of the four brotherhoods. See op. cit. in n. 1, p. 37, Appendix to Book Two, pp. 39-40, 43-44, 50-52. They read as follows:

"(1) That all disputes growing out of personal grievances or out of the interpretation or application of the schedules, agreement or practices now, or hereafter established on the railroads signatory hereto, which can not be adjusted by direct conference between representatives of the individual railroad and its respective employees shall be disposed of in the following manner:

• • • • •

"(8) Disputes arising between a railroad and its employees covered by this agreement will be handled, etc.

• • • • •

"On a written petition signed by not less than one hun-

During the period 1920-1926, approximately 4,000 decisions in adjustment and other cases were also handed down by the Railroad Labor Board created pursuant to Section 304 of the Transportation Act of 1920.[1] The adjustment jurisdiction of the Labor Board was confined neither to the disputes of specified crafts only nor to the disputes of any particular labor organization or organizations. Section 307 (a) of the Act directed the Railroad Labor Board to hear and decide any dispute involving grievances, rules, or working conditions on which an adjustment board had deadlocked, if the adjustment board certified the deadlock to the Labor Board; the Labor Board was also authorized to act on its own motion if it determined that an adjustment board had deadlocked or failed to consider a dispute with due diligence, and it was authorized to handle disputes in the first instance in cases where an appropriate adjustment board had not been organized pursuant to the provisions of Section 302 of the Act.

It was under the Transportation Act of 1920 that yardmasters were first definitely recognized and treated as "employees," rather than as "officials." The term "subordinate officials" was invented for them and certain other employees, but at no time during the period 1920-1926 were yardmasters classed with or treated as yard-service employees.

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dred unorganized employees of the classes covered by this agreement, directly interested in the dispute the Board shall hear and decide any dispute covered by this agreement; provided, that no dispute over an interpretation of an existing agreement, rule or practice which has been agreed to or accepted by the management and the duly constituted committee representing the employees, parties thereto, shall be considered as a dispute under this agreement.

"(9) No matter shall be considered by the Board unless referred to it in the manner herein prescribed."

[1] See *Decisions of the United States Railroad Labor Board*, Vols. I-VII, 1920-1926.

Section 300 (5) under Title III of the Act provided as follows:

> "The term 'subordinate official' includes officials of carriers of such class or rank as the [Interstate Commerce] Commission shall designate by regulations • • •."

Pursuant to this section the Interstate Commerce Commission issued a regulation designating the class of employees to be included under the term "subordinate official" under Transportation Act of 1920. Yardmasters, other than general yardmasters at large and important switching centers, were among those named.[1]

The United States Railroad Labor Board, in issuing its Decision No. 2, dated July 20, 1920, which increased the rates of pay of large numbers of railroad employees, including yardmasters and yard-service employees, separately considered and treated those two classes of employees.[2] Article VI of Decision No. 2 relates to "Engine Service Employees," under which, in Sections 3 and 4, under "Yard Service," the rates of pay of engineers, firemen, helpers, hostlers, and hostler helpers are shown. Article VII relates to "Train-Service Employees," and in Section 4 thereof, entitled "Yard Service," the rates of pay of foremen (yard conductors), helpers, and switchtenders are shown. In short, the cited passages deal with train- and engine-service employees in yard service, otherwise known as yard-service employees. On the other hand, the rates of pay for yardmasters are shown in Article XI, which is entitled "Other Supervisory Forces."

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[1] *Ex parte No. 72*, "Regulations designating the classes of employees that are to be included within the term 'subordinate official' under Title III of the Transportation Act, 1920," dated November 24, 1920.

[2] *Decisions of the United States Railroad Labor Board*, Vol. I, p. 13.

Similar classifications were observed in Decision No. 147, dated June 21, 1921, in which rates of pay were decreased.[1]

There is no evidence in the record that the petitioner organizations had any active members employed as yardmasters during the period 1920-1926. In its Decision No. 1266, dated October 13, 1922, the Railroad Labor Board for the first time provided for standard rules governing the working conditions of yardmasters.[2] Parties to this proceeding were certain railroads and the Railroad Yardmasters of America, but not the petitioner organizations.

(3) *Under the Railway Labor Act (1926-1934).*

The Railway Labor Act of 1926, c. 347, 44 Stat. 577, which superseded the Transportation Act of 1920, likewise directed that boards of adjustment should be created by agreement. Each agreement was required to specify the group or groups of employees covered by the adjustment board which it created.[3]

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[1] *Decisions of the United States Railroad Labor Board*, Vol. II, pp. 151-153.

[2] *Decisions of the United States Railroad Labor Board*, Vol. III, p. 765.

[3] The Act provided in Section 3 for so-called "boards of adjustment" to be created "by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees." The statute did not specify the jurisdiction of any such board over the parties to a dispute, except in Section 3 as follows:

"The agreement:

* * * * * *

"(b) Shall state the group or groups of employees covered by such adjustment board.

* * * * * *

"Second. Nothing in this Act shall be construed to prohibit an individual carrier and its employees from agreeing upon the settlement of disputes through such machinery of contract and adjustment as they may mutually establish."

The three original agreements creating the eastern, southeastern, and western Train Service Boards of Adjustment were continued in effect under the Railway Labor Act of 1926.[1] An additional agreement, entered into by the four brotherhoods and certain carriers, created the Southwestern Regional Train Service Board of Adjustment, April 4, 1928.[2] This agreement defined the types of disputes that would be heard and expressly limited the jurisdiction of the Board as follows:

> "(B) The groups of employees covered by the adjustment board are those represented by:
> Order of Railway Conductors
> Brotherhood of Locomotive Engineers
> Brotherhood of Railroad Trainmen
> Brotherhood of Locomotive Firemen and Enginemen."[3]

The Railway Labor Act of 1926 also authorized individual carriers and their employees to enter into agreements creating adjustment boards. Under this authorization the system boards previously established were continued, and, in fact, the number of such boards increased.

As under the Transportation Act of 1920, so under the Railway Labor Act of 1926, the only yardmasters' and yard-service employees' disputes that could be heard by the Train Service Boards of Adjustment were those of members of the four brotherhoods. Large numbers of yard-service employees, such as those belonging to the Switchmen's Union of North America, were not subject

[1] Modifications not material in the present connection were made in the agreement for the Western Region on April 17, 1928, and May 17, 1933, and in the agreement with certain eastern lines on February 7, 1928, and April 18, 1933. Op. cit. in n. 1, p. 37, Book Two, p. 410.

[2] Op. cit. in n. 1, p. 37, Book Two, p. 410, Appendix to Book Two, p. 57.

[3] Op. cit. in n. 1, p. 37, Appendix to Book Two, p. 58.

to the jurisdiction of the Train Service Boards of Adjustment, and only the comparatively few yardmasters belonging to the signatory organizations were subject to that jurisdiction. The record does not show how many active members of the petitioner organizations were employed as yardmasters during the period 1926-1934, or how many disputes of yardmasters were submitted to the Train Service Boards of Adjustment, if there were any such. The "alignment" of yardmasters with yard-service employees in the petitioner organizations was at best just barely measurable, for in 1936, the earliest date showing any such "alignment" at all, the petitioner Order of Railway Conductors did not represent yardmasters on *any* road and the petitioner Brotherhood of Railroad Trainmen represented them on *four* roads having a mileage of only 3,121. Practically all represented yardmasters at that time were found in other organizations: the intervenor Railroad Yardmasters of America (18 roads with 57,281 miles), the Railroad Yardmasters of North America (3 roads with 2,842 miles), and the system associations (19 roads with 50,082 miles).[1]

In view of the situation as it had existed long prior to the 1934 amendments, it is difficult to see how there could have been any intention in 1934 to include yardmasters within the term "yard-service employees" in the statement of the jurisdiction of the new First Division. There was no reason why there should have been any such intention. The two crafts had never been regarded or treated for any purpose as forming a single group.[2] It seems perfectly clear that the thought behind the creation of the new First Division was to give to it the disputes, and only those, of train- and engine-service employees engaged

[1] Second Annual Report of the National Mediation Board, 1936, pp. 24-25.

[2] See n. 1, p. 19, *supra*.

in road and yard service. If yardmasters had been thought of, they must necessarily have been mentioned, for they had never before 1934 been aligned or classed with those employees. The testimony of the chairman of the legislative committee of the Railway Labor Executives Association, given before the House committee when the 1934 amendments were under consideration, is revealing:

> "Division 1 shall have jurisdiction over controversies affecting the train, engine and yard-service employees. That is, the switchmen and the engineers and the firemen and conductors, and the trainmen and *other related train-service employees.*"[1]

(4) *Under the Railway Labor Act as Amended (Since 1934).*

The many unsatisfactory features of the old system caused the enactment of the 1934 amendments establishing jurisdiction on the basis of designated crafts. Petitioners' attempt to dismiss the 1934 amendments as really creating nothing new and different is not well conceived. The change from boards created by agreement to boards created by statute, and having prescribed rather than conventional jurisdiction, was in the proper sense of the word radical.

This Court has commented on the 1934 amendments as follows, in *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 725-727 (1945):

> "Prior to 1934 the parties were free at all times to go to court to settle these disputes. Notwithstanding the contrary intent of the 1926 Act, each also had the

[1] From the statement made May 24, 1934 by George M. Harrison, President of the Brotherhood of Railway Express and Station Employees, in *Hearings before the Committee on Interstate and Foreign Commerce*, House of Representatives, 73rd Congress, Second Session, on H.R. 7650, p. 82.

power, if not the right, to defeat the intended settlement of grievances *by declining to join in creating the local boards of adjustment provided for by that Act.* They exercised this power to the limit. Deadlock became the common practice, making decision impossible. The result was a complete breakdown in the practical working of the machinery. * * * To break this log jam, and at the same time to get grievances out of the way of the settling of major disputes through the functioning of the Mediation Board, the Adjustment Board was created and given power to decide them.

"The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. *Another tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them.* Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation."

No longer is the jurisdiction of an adjustment board determined by the representation of a particular labor organization, or left to agreement; it is defined strictly in terms of disputes involving specified crafts of employees, *regardless of the labor affiliations of such employees.* The new boards of adjustment, now called divisions of the National Railroad Adjustment Board, were not created by signed agreement, as were the prior boards, but by statute. The jurisdiction of the First Division is confined to "disputes involving train- and yard-service employees," while that of the Fourth Division extends to the disputes of water carrier employees *and* the disputes of "all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions."

By reason of the new scheme of jurisdiction established in 1934, the membership of any labor organization may find it necessary to go to more than one division of the National Railroad Adjustment Board.

The Order of Railway Conductors includes Pullman conductors among its membership. Disputes involving such employees are subject to the jurisdiction of the Third Division, and the Order of Railway Conductors has so submitted them.[1] Disputes involving dining-car employees are also subject to the jurisdiction of the Third Division, and disputes involving such employees who are members of the Order of Railway Conductors are submitted to that division.[2] The Brotherhood of Railroad Trainmen includes dining-car employees among its membership, and their disputes are referable and, in fact, are regularly submitted to the Third Division by the Brotherhood of Railroad Trainmen, as is shown by numerous awards of that Division.[3] The Brotherhood of Railroad Trainmen has no member representative on the Third Division, and such a board, prior to 1934, would for that reason have had no jurisdiction over the disputes of an employee belonging to the Trainmen.

It is not clear from petitioners' broad and general discussion of the historical material in Part I of their Argument (pp. 15-26 of petitioners' brief) precisely what light it is supposed to cast on the meaning of the statutory term. If the discussion has any point at all it must be assumed that it was intended to create an impression that yard-

[1] See Third Division Awards 2285, 2996, 2363, and 2364.

[2] See Third Division Awards 836, 1029, 1104, 1107-1111, 1191, 1377, and 1436.

[3] See Third Division Awards 493, 549, 550, 695-697, 701-704, 782, 796, 905, 929, 991, 1026, 1027, 1097-1100, 1105, 1132, 1207, 1235, 1236, 1350, 1433, 1999, 2002, 2229, and 2259-2261.

master disputes were handled as they were prior to 1934 because somebody thought that yardmasters were "yard-service employees." Nothing could be further from the fact. It is entirely beyond dispute that the criterion under the several previous systems was not whether the employee was a member of a particular craft, but whether he was a member of a particular labor organization and an employee of a particular carrier.

If, in disregard of the terms of Section 3 First (h), the District Court had taken for its guide the jurisdictional pattern of the earlier adjustment machinery, it could not have found that any one of the four present divisions has jurisdiction of all yardmen or of all yardmasters and, indeed, could have reached no conclusion reconcilable with the statute. In the light of these facts the Circuit Court of Appeals properly held, we submit, that the District Court was right in concluding that the alleged "historical alignment" of yardmasters and yard-service employees was not helpful in determining the meaning of the present statute. R. 277.

III.

Petitioners' Reliance Upon an "Administrative Interpretation" of the Statute.

It is argued here, as below, that the jurisdiction of the First Division over yardmaster disputes is established by the settled administrative action of that division. But the facts, as we shall show, are that within three years after the Board began to function, both the First and the Fourth Divisions had deadlocked on the question, and that the rival labor organizations then brought two court cases to determine the issue, for the very reason that the action of the Board had not resolved the controversy but had

only produced confusion in the administration of the statute. In such a record, the elements of administrative interpretation can not be found.

Any consideration of the administrative action of the Board in this matter necessarily involves an examination of the action of two of its divisions, the First and the Fourth, because both have dealt with yardmaster disputes.

The 1934 amendments to the Railway Labor Act became effective on June 21 of that year, but it was not until the spring of 1935 that the several divisions of the new National Railroad Adjustment Board began rendering awards.[1] *The very first administrative action by the Board on the question of jurisdiction over disputes involving yardmasters was a deadlock.* That deadlock occurred between the carrier and the labor members of the Fourth Division in June 1935, on the question of accepting a yardmaster dispute submitted by the Railroad Yardmasters of America and the Northern Pacific Railway Company. As a result of the deadlock, the dispute was shown undocketed in the reports of the Fourth Division for the years 1935 and 1936.[2] Its ultimate disposition does not appear in the annual reports or published awards of the Fourth Division. Another deadlock on the question of jurisdiction occurred in the Fourth Division in 1937 over two yardmaster disputes submitted by the American Railway Supervisors' Association.[3]

In January 1938 the carrier and the labor members of the First Division deadlocked on the question of jurisdiction specifically in four cases involving yardmasters (Dockets 1198, 4503, 4504, and 4505.) A statement of the

[1] See note 3, page 6.

[2] See Annual Reports of the National Mediation Board, including Reports of the National Railroad Adjustment Board, 1935, p. 58, 1936, p. 46.

[3] Op. cit. in n. 2, *supra*, 1937, p. 34.

carrier members' position was filed in the proceedings on March 1, 1938.[1]

On March 15, 1938 the Railroad Yardmasters of America filed disputes involving three Southern Pacific yardmasters with the Fourth Division, which deadlocked again, whereupon the Railroad Yardmasters of America filed suit in the United States District Court in Chicago against the carrier and the labor members of the Fourth Division (Chancery No. 16031) for a mandatory injunction to compel them to hear the disputes. R. 157-158. The Fourth Annual Report of the Fourth Division discloses (p. 46) that on June 30, 1938 the carrier and the labor members were still deadlocked on the three Southern Pacific yardmasters' disputes. Judge Holly's decree in Chancery No. 16031, directing the Fourth Division to hear those disputes, was entered on July 11, 1938. R. 158.

Following the entry of the decree in Chancery No. 16031, the Order of Railway Conductors, one of the petitioners here, was at first disposed to accept the jurisdictional question as settled. On August 13, 1938 the Conductors joined with the Great Northern Railway Company in submitting to the Fourth Division two yardmaster disputes, and that division accepted them. On September 12, 1938, however, the Conductors withdrew the disputes and on October 11, 1938 filed them with the First Division. The Great Northern promptly filed an objection to the jurisdiction. The disputes are still pending in the First Division, unheard by reason of the refusal of the carrier members to consider yardmaster disputes. R. 158-159, 160.

Also pending in the First Division, unheard because of the jurisdictional deadlock, is a dispute involving a South-

[1] A copy of that statement accompanied by affidavit of R. A. Knoff, a carrier member of the First Division, has been included with the record transmitted to this Court and is referred to pursuant to stipulation by all parties filed with the Clerk of this Court.

ern Pacific yardmaster, filed over five years ago by the Brotherhood of Railroad Trainmen and docketed on March 26, 1941 as No. 12295. R. 159-160.

The carrier members of the First Division formally notified the labor members in writing, on August 28, 1941, that they would thenceforth not participate in the consideration of any disputes involving yardmasters. R. 160-161. Actually, the deadlock on the First Division antedated this letter by several years, during which a long list of cases involving yardmasters had accumulated in the First Division and remained unheard because of the deadlock. The lowest docket number of such cases is 4535, docketed July 1, 1937. R. 160-161.

A few months after the formal notification served by the carrier members on the labor members, as stated above, the petitioners brought this case (January 12, 1942), claiming a settled administrative interpretation of the Act.

Petitioners' argument on administrative interpretation ignores the facts stated above and relies entirely on certain awards rendered by the First Division. The specific awards are Nos. 1274, 1603, 1648, 1649, 1896, 1897, 2364, 2490, 2491, 2712, 2713, 2970, 3609, 3610, 4077, 4117, 4150, 4548, and 4584, all contained in Plaintiffs' Exhibit K introduced at the trial, except Nos. 4077, 4150, and 2712, which are Exhibits E, F, and G to the plaintiffs' original petition.

Most of these cases are not disputes involving yardmasters, and both courts below so observed. They are in reality nothing more than complaints of yard-service employees, based on the agreements between those employees and the carriers, over alleged violation of the employees' rights under such agreements. In other words, yardmen were insisting upon rights attaching to them in that capacity, granted to them, or so they claimed, by agreements governing the relations between carriers and yardmen. Agreements between the yardmasters and the

carriers were in nowise involved. Most of the disputes related to the promotion of yard-service employees, and the typical complaint was that the agreement with such employees had been violated by the carrier in not giving due consideration to a senior qualified yardman in filling a yardmaster vacancy. Cases of this type are clearly within the jurisdiction of the First Division as disputes involving yard-service employees. See First Division Awards, 1274, 1603, 1648, 1897, 2364, 2490, 2491, 3609, 3610, 4077, and 4150. First Division Awards 4548 and 4584, also relied upon by the petitioners, were likewise cases in which rights claimed to have been granted to employees in their capacity as yard-service employees were at issue. Rights, privileges, and duties of yardmaster employees were not claimed to have been violated, were not submitted for adjustment, and were not involved. R. 227, 277.

Specific mention should be made of three First Division awards relied upon by the petitioners as instances of yardmaster disputes settled by that division, Awards 2970, 2710, and 2711.

Award 2970 was a case not even considered on the merits by the First Division, for upon examination it appeared that it involved the fixing of wages and hours for yardmasters. The case was properly *dismissed*, for the National Railroad Adjustment Board has no jurisdiction to fix the wages and hours of yardmasters or any other employees. It is indeed interesting to find the petitioners in their brief (p. 30) using the case in the following manner: "* * * Award No. 2970 ruled on a yardmaster complaint concerning claims for overtime." That statement implies just the opposite of the ruling actually made by the First Division.

Another questionable use of source material in the

petitioners' brief occurs at page 30, where they cite, in *support* of their claim of harmonious administrative interpretation, Awards 2710 and 2711, in which, as they say, "the members of the First Division gave specific attention to the jurisdictional question." Specific attention was indeed given to the question in those cases, for they, as well as Awards 2712 and 2713, were the very disputes in which the carrier and the labor members deadlocked on the question of jurisdiction to hear yardmasters' disputes and with respect to which the carrier members submitted their memorandum denying jurisdiction (see *supra*, pp. 53-54).

There remain, as the court below observed (R. 277), only three cases, among all those cited by the petitioners, that appear to be proper yardmaster disputes entertained by the First Division without jurisdictional objection made by the carrier members. These are Awards 1649 and 1896 (January and April 1937) and Award 4117 (August 1938). In the first two cases, yardmasters complained of wrongful demotion to yardman positions, and in the last, a yardmaster claimed a rate of pay under one agreement rather than another. In none of these three awards is there a word of discussion of the jurisdictional question at issue here. Each contains a recitation common to all of the thousands of First Division awards: "This Division of the Adjustment Board has jurisdiction over the dispute involved herein."

The weight to be attached to these three cases is negligible.

The explanation of the inconsistent action of the First Division in alternately assuming jurisdiction of yardmaster disputes, and then deadlocking on the question, can only be found in the great volume of its business and the pressure under which it labors. The First Division is a group of ten representatives of the carriers and certain labor

organizations—five on each side, paid by their principals—engaged in "adjusting" minor disputes and grievances in such volume, at such a rate, and in such manner as necessarily to preclude the careful working out and consistent application of principles and great regard for precedent and prior practice.[1]

The last docket number in the First Division on October 29, 1946 was 21,817, indicating an average of more than 1,800 cases filed each year since 1934. The number of awards rendered each year is approximately 1,000. During the fiscal year ending June 30, 1945, 2,233 disputes were docketed, 1,221 awards were rendered, 1,430 disputes were withdrawn, and at the end of that fiscal year 4,720 cases were pending.[2] The First Division is grossly overworked. It is, and has been for years, thousands of cases behind on its docket.[3] President Roosevelt twice tried to find some solution of the problem of the First Division and its docket. His last effort, in February of 1945, was to appoint a Mr. E. J. Connors to study the work of the First Division. The President's letter of instructions to Mr. Connors, under date of February 13, 1945, read in part as follows:

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[1] There is, in fact, a longstanding difference of opinion on the question whether the function of the Adjustment Board is adjudication or something called "adjustment." Likewise, the force of prior awards as precedents is disputed. The labor position in theory is that the divisions are purely adjustment agencies, unfettered by principles, precedents, or any legal concepts, while the carrier position is more strict, but in actual practice the positions appear some times to be reversed. See *The Attorney General's Committee on Administration Procedure, Railway Labor, The National Railroad Adjustment Board and The National Mediation Board,* Monograph No. 17, April 1940, pp. 8-12, 36-43.

[2] Eleventh Annual Report of the National Mediation Board Including the Report of the National Railroad Adjustment Board 1945, p. 61.

[3] The pending cases have increased in number with the passage of time, from 1,095 on June 30, 1935 to 4,720 on June 30, 1945. Annual Report of the National Mediation Board, 1935, p. 39, 1945 p. 61.

"You are hereby delegated to make a study of the disputes filed with the First Division of the National Railroad Adjustment Board and now pending undetermined before that Board and render a full report thereon to me with your recommendations for:

* * * * * *

"(b) Reduction in the number of controversies submitted to the First Division of the Board and improvement in methods and procedure for the more expeditious handling of cases."

In such a mass of business as the First Division has had to contend with, it is not surprising to find, in chronological order, two yardmaster cases in which the carrier members did not raise the jurisdictional objection (Awards 1649 and 1896, January and April 1937), four cases in which they did raise the objection (Dockets 1198, 4503, 4504, and 4505, January 1938), one case again in which they did not raise the objection (Award 4117, August 1938), and finally, in August 1941, a formal statement refusing to participate in the consideration of yardmaster disputes.

The statement in the three yardmaster awards rendered by the First Division without apparent jurisdictional objection from the carrier members (Nos. 1649, 1896, and 4117)—"This division of the Adjustment Board has jurisdiction over the dispute involved herein"—is without significance, because it is merely a reprint from a form devised for the use of the Secretary of the First Division in making up the official reports of awards. Since 1935 all First Division reports of awards have been set up in accordance with this form, known as Form 1.

The first part of the report as prepared by the Secretary is the "Statement of Claim," which is taken from the claim as docketed. Next follows the "Employes' Statement of Facts" and the "Carrier's Statement of Facts" or, if the parties have joined in submitting the dispute, a "Joint Statement of Facts," and in any case these parts

of the report are lifted directly from the written statements filed by the parties. Argumentative matter submitted by the parties is often included next under the headings "Position of Employees" and "Position of Carrier."[1]

The Secretary then reprints from Form 1, in all reports of awards, the following boiler-plate material:

> "FINDINGS: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:
>
> "The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.
>
> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein.
>
> "The parties to said dispute waived hearing thereon."[2]

Immediately after the routine recitations just quoted, including that as to "jurisdiction over the dispute," the Secretary inserts the only part of the report actually composed by the members of the First Division or by a referee in case the members have deadlocked. The following is an illustration (Award No. 10739, dated June 26, 1945), chosen purposely to expose the anomalous situation that sometimes results from the juxtaposition of the Secretary's "finding" on jurisdiction and a declaration in the award written by the members themselves that jurisdiction does not exist:

> "**[Secretary's finding]** This Division of the Adjustment Board has jurisdiction over the dispute involved herein.
>
> * * * * * *

[1] In discipline cases the facts and the arguments are usually omitted from the published reports.

[2] Or, if there has been a hearing: "The parties to said dispute were given due notice of hearing thereon."

"**[Declaration by members of the First Division]** The Division holds subject of dispute is a negotiable matter between the parties and same is dismissed for lack of jurisdiction.

"AWARD

"Case dismissed."

Another illustration (Award No. 744, dated December 17, 1935):

"**[Secretary's finding]** This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

* * * * *

"**[Declaration by members of the First Division]** The agreement of February 14, 1933, does not specify that rates of pay other than those provided in the schedule should be applicable.

"AWARD

"This Division is without jurisdiction to establish a rate of pay not specified in the agreement or schedule. Case dismissed."

As the quoted examples show, the Secretary's "finding" of jurisdiction is sometimes in conflict with that of the members of the First Division.[1] His rubber-stamp "finding" does not indicate, as petitioners claim, that the members of the First Division have considered the question of jurisdiction. It is of no legal or administrative significance whatever. The reports of the three yardmaster awards rendered by the First Division (Nos. 1649, 1896, and 4117, discussed above at p. 57) contain nothing on jurisdiction except the usual "finding." If the jurisdictional point had been considered, it would have been mentioned in that part of the findings actually written and agreed upon by the members of the First Division, for it appears that when they deal with a jurisdictional question they deal with it expressly, in their own words and not by means of a standard formula applied uniformly by

[1] See also First Division Awards 399, 2970, 3012, 5077, 5288, 9023, 10135, and 10251.

the Secretary in every one of more than 10,000 reports of awards.

The jurisdictional dispute here at issue arose in the very first days of the Board and has never been settled. Prior to 1938 the labor and the carrier members of the Fourth Division deadlocked over the acceptance of yardmaster cases, but since that time they have taken them and rendered many awards. The labor and the carrier members of the First Division deadlocked on the question in January 1938, and since August 1941 the carrier members have refused to participate in the consideration of yardmaster disputes. This case is merely the latest incident in a contest that has been going on since 1935. Petitioners' claim of settled administrative interpretation rests on three yardmaster awards rendered by the First Division on the merits without consideration of the jurisdictional question.

In cases where administrative interpretation may properly be sought as an aid to construction, there must have been definite and unequivocal action on a question of the type under consideration, and it must be authoritative in character, uniform, consistent, and long-continued, otherwise it is not entitled to respect. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 279-280 (1929); *Estate of Sanford* v. *Commissioner of Internal Revenue*, 308 U. S. 39, 52-54 (1939); *Higgins* v. *Commissioner of Internal Revenue*, 312 U. S. 212, 215-216 (1941); *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16 (1932); *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 643-644 (1933).

From the foregoing outline of the facts it is apparent that within approximately six years after the divisions set up by Section 3 First (h) began to function, the jurisdictional controversy now in issue had reached such a point that three labor organizations representing yardmasters had instituted two separate court proceedings to obtain a judi-

cial construction of the statute for the very reason, contrary to the petitioners' contention, that there was actually no settled administrative interpretation of the law, but only disorganization and controversy. These two resorts to the courts for the construction of this recent statute are a sufficient answer, we believe, to the argument that the issue in this case should be decided on the basis of a settled administrative interpretation. The essential thought of both courts below was that the alleged administrative interpretation was neither substantial nor definite, and we submit that they were right.

IV.

The Argument That the First Division Should Have Jurisdiction of Yardmasters' Disputes, Because It Has Jurisdiction Over Disputes Involving Employees Engaged In "Related Work," Is Unsound.

In their petition filed in the District Court the petitioners alleged (R. 8) that

> "the duties of said yardmasters are confined to the operation of rail carriers and are in direct cooperation and operation with the duties performed by rail carrier employees in train, engine and yard-service • • • ."

That allegation is the basis for an argument that runs through petitioners' whole presentation of the case, below and here, to the effect that yardmasters should be grouped with yard-service employees in the submission of disputes because the two classes of employees are engaged in related lines of work. It is argued that the design of the statute was to divide the disputes of employees among the four divisions according to related lines of work.

Obviously, the yardmaster and all the many crafts that work in the yard under his supervision, including the yard-

service employees, are engaged in related lines of work. All that petitioners' "related lines of work" argument amounts to, in its bearing on the language of the statute, is that yardmasters should be grouped with yard-service employees *because both crafts work in the yard.* This contention is advanced by petitioners notwithstanding the fact that a multitude of other employees and classes of employees likewise work within yard limits, including road-service employees while handling their trains within yard limits, yard clerks (from whose ranks yardmasters are often recruited), telephone and telegraph operators, towermen, signalmen, car inspectors and repairers, track maintenance foremen and laborers, car checkers, yard checkers, and weighmasters, and petitioners agree that none of these employees are called yard-service employees. R. 162, 163-164, 198, 213.

Of necessity there is a very high degree of co-ordination and integration in the work of railroad employees. The various occupations are so closely related that, if jurisdiction over the disputes of any class of employees were to be governed by the working association of that class with some other class, the jurisdictional definitions of Section 3 First (h) would overlap and be reduced to chaos.

There is no denying that the yardmaster is just as closely associated with the yard clerical force, for example, as with the yard-service employees.[1] Yet the yard clerks' disputes must be submitted to the Third Division of the

[1] It is argued that yardmasters frequently acquire the position by promotion from the ranks of yardmen and that they retain the privilege of exercising seniority rights as yardmen if they return to yard service. The record shows that yardmasters are also promoted from other classes of employees—the yard clerical force, for example—and may go back to their former services when necessary, exercising when they do so whatever rights of seniority they may have retained. Plaintiffs' Exhibit A; Defendants' Exhibit 1-H, bottom of page 2; also Plaintiffs' Exhibit D (dispatcher appointed yardmaster).

National Railroad Adjustment Board. See 45 U. S. C., Sec. 153 First (h). On the basis of the plaintiffs' "related lines of work" argument, yardmasters' disputes would be within the jurisdiction of at least two divisions, the First and the Third. Petitioners' argument leads not to a rational workable construction of the statute but only to confusion.

It is not apparent how petitioners can assert the existence of an intent on the part of Congress to divide employees' disputes according to related lines of work, when two of the divisions—the Third and the Fourth—plainly have jurisdiction over the disputes of a conglomeration of employees. The Third Division hears the disputes, among others, of telegraph employees and maids, clerical employees and maintenance-of-way men, train dispatchers and sleeping-car porters. The Fourth Division hears disputes involving employees of carriers by water and "all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions," including numerous supervisory employees whose work is closely related to that of employees whose disputes are expressly assigned to other divisions.[1] It cannot seriously be contended that there is any design running through Section 3 First (h), the governing principle of which is a distribution of jurisdiction among the four divisions according to "related lines of work." Congress simply did not adopt that criterion in establishing the jurisdiction of the several divisions. Specific crafts are assigned to the first three divisions, and the employees not embraced within those specific designations are expressly assigned to the Fourth Division.

In connection with their argument on this subject petitioners assert that difficulties will be experienced in the administration of the statute if a *yardmaster* complaining of

[1] See *infra*, pp. 67-68.

demotion to yardman is required to submit his dispute to the Fourth Division, while a *yardman* complaining of denial of promotion to a yardmaster position must submit his dispute to the First Division. We suggest that this argument is nothing but a play on the similar sounding words "yardmaster" and "yardman." The words "yardmaster" and "yard clerk" lend themselves to the device with equal facility, but no administrative difficulty has resulted from the statutory assignment of disputes involving yard clerks to the Third Division and disputes involving yardmasters to another division which, whether it be the First or the Fourth, is certainly not the Third. The disputes that come before the Adjustment Board are disputes over the interpretation of the working agreements of the various crafts. If the employee is asserting rights alleged to arise out of his agreement as a yard-service employee, his dispute is one for the First Division. If the claim is based on the employee's agreement as a yard clerk, the dispute is one for the Third Division. And if the claim is based on the employee's agreement as a yardmaster, or as a member of any other craft not specifically assigned to one of the first three divisions, the dispute, we submit, is one for the Fourth Division. The difficulties apprehended by petitioners could not arise in the very nature of the situation, and in practice they have not arisen in the last eight years during which the disputes of yard-service employees have been adjusted by the First Division and those of yardmasters by the Fourth.

V.

The Implied Inexperience and Incompetence of the Fourth Division In the Railroad Field.

Petitioners have been concerned to suggest at every possible point in their brief that the Fourth Division is a *marine* body, exclusively staffed by representatives of longshoremen and sailors and water carriers and occupied primarily with the disputes of water carriers' employees. It is argued, although less openly here than below, that that division is not competent to handle yardmaster disputes.

The water carrier jurisdiction is merely a part of the catch-all jurisdiction of the Fourth Division. Congress having specifically enumerated the crafts whose disputes should be submitted to the first three divisions, the creation of the Fourth Division, with jurisdiction defined in general terms, was a necessity. It is a misconception of the Act to think of the Fourth Division primarily as a marine body. The essence of its jurisdiction is generality, embracing all disputes not elsewhere assigned, whether marine or railroad disputes.

As a matter of fact, the work of the Fourth Division is almost entirely in the railroad field. The annual reports of the National Railroad Adjustment Board show that 92% of all of the disputes determined by the Fourth Division have been disputes involving employees of rail carriers not assigned to any of the first three divisions and that in the last three years every dispute docketed with the Fourth Division has arisen in the railroad field.[1]

The following analysis of the published Fourth Division awards reveals that the rail carrier disputes handled by that division have involved the following classes of em-

[1] Annual Reports of the National Mediation Board, 1944, p. 56, 1945, 66, 1946 (not yet published).

ployees, among whom will be noted numerous supervisory employees who, like the yardmasters, are not mentioned in the jurisdictional definitions for the first three divisions:

Yardmaster and assistant yardmaster.

Enginehouse foreman, assistant enginehouse foreman, gang foreman at enginehouse, roundhouse foreman.

General car foreman, car cleaning foreman, freight car cleaning foreman, sheet metal foreman, shop foreman, assistant car foreman, chief electrician, mechanical department foreman, welder foreman, wrecker foreman, labor foreman.

Parlor car, buffet car, and train porters.

Station restaurant waitress.

Watchmen (night watchman, freighthouse watchman, watchman in special agent's department, headquarters building watchman).

Travelling A. R. A. inspector.

Repair track piece work inspector.

Piece work inspector.

Motor coach operator (member of the Brotherhood of Railroad Trainmen).

Assistant medical examiner.

Various employees in the police department (special officer, police sergeant, supervisory employee in police department, patrolman, investigator, employee in police department).

Claim agents.

Grain elevator employees.

Crossing tenders and gatemen.

The labor members of the Fourth Division are representatives of marine organizations. In their assignment to sit on a board, more than 90% of whose work is in the railroad field, the carriers have had no part. The selection of the labor representatives on the entire Board, and their assignment to the several divisions, is in the hands of the national labor organizations, under Section 3 First (c) of the Act.

The carrier members of the Fourth Division are not

representatives of marine carriers; they are all experienced railroad men.

Mr. H. J. Reeser, the present chairman of the Fourth Division, was with the Pennsylvania Railroad from 1913 to 1936, as clerk, chief clerk, statistician, travelling timekeeper, and examiner. Since 1936 he has been an examiner for the carrier members of the First Division (chief examiner since 1942), and his service on the Fourth Division is in addition to that employment.

Mr. E. W. Fowler has served as a carrier member on three divisions of the Board and has been a defendant in this case in two capacities, as *a carrier member of the First Division,* which position he held when the complaint was filed in January 1942, and since July 1944 as a carrier member of the Fourth Division. From July 1935 to January 1936 he was a carrier member of the Third Division. Prior to 1935 Mr. Fowler was employed by various railroads, beginning in 1899 with the Chicago Great Western, as agent and operator, dispatcher, chief dispatcher, superintendent of transportation, general superintendent of transportation, and assistant general manager.

Mr. T. F. Purcell, who has replaced Mr. J. W. Cox (a railroad man) as a carrier member of the Fourth Division, is also at this time Secretary-Treasurer of the Bureau of Information of the Southeastern Railways. His railroad experience began in 1910, in the Aurora locomotive shops of the Burlington Railroad, and he was thereafter a timekeeper, secretary to the general superintendent of motive power, mechanical inspector on the road and in yards, and a staff officer under the vice president in charge of operations.

The carrier membership on the Fourth Division changes from time to time, but since the creation of the division it has consisted exclusively of railroad men.

Notwithstanding the fact that marine disputes come before the Fourth Division because of the catch-all character of its jurisdiction, the fact that 92% of its awards have involved railroad and not marine disputes, and the fact that the only marine members of that division are those selected by petitioners and certain other national labor organizations, petitioners have argued throughout their briefs, here and below, that the First Division is highly competent and the Fourth Division incompetent to handle yardmaster disputes. This is the view of the two petitioner organizations, which represent relatively few yardmasters, as to what is best for the great body of yardmasters, whom they do not represent. The view of the overwhelming majority of yardmasters is that their disputes should be handled by the Fourth Division, as they have been handled, satisfactorily it appears, for the last eight years.

VI.

The Effect of Rule 52(a).

Rule 52(a) of the Federal Rules of Civil Procedure provides as follows:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The findings of fact that the petitioners would have this Court overthrow—Nos. 7 to 13[1]—far from being clearly erroneous, are, we submit, amply supported by the evidence. The District Court saw and heard the witnesses

[1] R. 232-233.

and on the whole record found the meaning of the railroad term used in the statute.

Petitioners sought a trial *de novo* in the Circuit Court of Appeals, declaring that that court "was in nowise bound by the findings of the trial court." They would deny any dignity or weight to the findings of the District Court, contrary to Rule 52(a) and the repeated decisions of the federal courts applying that rule. We submit that the clear intent of Rule 52(a) is that the informed judgment of the trial court is not to be regarded merely as a time-consuming procedural step that is of no effect except to clear the way for the submission of the issue to the appellate courts.

In *Apex Electrical Manufacturing Company* v. *Maytag Company*, 122 F. (2d) 182, 187 (C. C. A. 7, 1941), cert. den. 314 U. S. 687 (1941), the court discussed Rule 52 as follows:

> "• • • There was certainly substantial evidence to support this conclusion, and though we might not agree with the trial court, yet we are not privileged to disturb its conclusion in this respect, for findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. Rule 52 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c; *General Motors Co.* v. *Swan Co.*, 6 Cir., 44 F. (2d) 24; *Stevens* v. *Carl Schmid, Inc.*, 2 Cir., 73 F. (2d) 54."

See also *Webb* v. *Frisch*, 111 F. (2d) 887, 888 (C. C. A. 7, 1940); *In re Duvall*, 103 F. (2d) 653, 654 (C. C. A. 7, 1939); *Edwards* v. *Lain*, 112 F. (2d) 343, 346-347 (C. C. A. 7, 1940); *Lewis* v. *United States*, 113 F. (2d) 489, 490 (C. C. A. 7, 1940).

We respectfully ask that the decision of the Circuit Court of Appeals sustaining the declaratory judgment of the District Court be affirmed.

Respectfully submitted,

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December 2, 1946.

APPENDIX.

Section 3 First (h) of the Railway Labor Act.

The jurisdiction of the four divisions of the National Railroad Adjustment Board is defined as follows in Section 3 First (h) of the Act, 45 U.S.C., Sec. 153 First (h):

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

DEC 2

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, President and F. H. NEMITZ, Senior Vice-President; and BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, President and S. R. HARVEY, Assistant President,

Petitioners,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, Respondents. RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY and SOUTHERN PACIFIC COMPANY,

Intervenor Respondents.

No. 63.

On Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit.

F. J. WILLIAMS, WILLIAM BISHOP, PAUL M. CARTER, M. J. LEACH, and FRED LEWIS, Individually and as Members of the National Railroad Adjustment Board,

Petitioners,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, Respondents. RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY and SOUTHERN PACIFIC COMPANY,

Intervenor Respondents.

No. 64

BRIEF OF RAILROAD YARDMASTERS OF AMERICA INTERVENOR-RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1946.

THE ORDER OF RAILWAY CONDUCTORS OF AMERICA, H. W. FRASER, President and F. H. NEMITZ, Senior Vice-President; and BROTHERHOOD OF RAILROAD TRAINMEN, A. F. WHITNEY, President and S. R. HARVEY, Assistant President,

Petitioners,

vs.

O. E. SWAN, T. K. FAHERTY, R. A. KNOFF, L. L. McDONALD, L. O. MURDOCK, H. J. REESER, J. W. COX, E. W. FOWLER, R. A. WALTON, W. O. HOLMES and J. M. FOX, Respondents. RAILROAD YARDMASTERS OF AMERICA, GREAT NORTHERN RAILWAY COMPANY and SOUTHERN PACIFIC COMPANY,

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No. 63

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Intervenor-Respondents.

No. 64

On Writ of Certiorari to the United States Circuit Court of Appeals, Seventh Circuit.

BRIEF OF RAILROAD YARDMASTERS OF AMERICA INTERVENOR-RESPONDENT.

The Opinions Below.

The opinion of the District Court appears at R. 222-7 and its decision at R. 229-234. The opinion of the Circuit Court of Appeals appears at R. 271-9 and is reported at 152 Fed. (2d) 325.

Jurisdiction.

The petitioners in Case No. 63 instituted the original action in the District Court of the United States for the Northern District of Illinois, Eastern Division, for a declaratory judgment pursuant to section 274d(1) of the judicial code, as amended. The judgment of the District Court was entered July 20, 1944. The judgment of the Circuit Court of Appeals was entered December 21, 1945. Petition for certiorari was filed in this Court March 18, 1946 and granted April 22, 1946. Petitioners invoked the jurisdiction of this Court under section 240(a) of the judicial code, as amended.

The Statute Involved.

The case involves the Railway Labor Act as amended, (45 U. S. C. A., sec. 151, *et seq.*) and particularly section 1 fifth and section 3 first (h) thereof which are set out in the appendix hereto, p. 43. Both courts below held that the fourth division of the National Railroad Adjustment Board created by that statute has, and that the first division thereof has not, jurisdiction of disputes involving yardmasters.

Statement.

Deeming the petitioners' statement of the case inadequate and in important particulars inaccurate, this respondent adds the following:

As of February 28, 1946, the date of the last available statistics, there were in railroad service in this country 6,070 yardmasters[1] and assistant yardmasters. Approximately 4,500 of them are members of this intervenor-respondent. Its membership except for about a dozen stationmasters consists entirely of yardmasters. The petitioner organizations are composed primarily of railroad employees in train and yard service. The Order of Railway Conductors has approximately 50,000 and the Brotherhood of Railroad Trainmen approximately 196,000 members.[2] On the basis of their stipulated percentages of total railroad mileage applied to the total number of yardmasters in service, these totals cannot include more than approximately twenty per cent of yardmasters in service. (R. 162).

The statement (brief 3) that the first, second and third divisions of the adjustment board are composed of representatives of *rail* carriers and of national labor organizations representing *rail* employees; and that the fourth division is composed of representatives of carriers directly or indirectly engaged in transportation by *water* and rep-

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[1]Interstate Commerce Commission, Bureau of Transport Economics and Statistics, Wage Statistics of Class 1 Steam Railways in the United States, Statement No. M-300, February, 1946. (In all respects material here both yardmasters and assistant yardmasters are included within the term "yardmasters" and are members of the same class of railroad employees.)

[2]Florence Peterson, Handbook of Labor Unions (1944) pp. 307, 319.

resentatives of labor organizations representing *marine* employees, suggests a line of demarcation between rail and water transportation which, insofar as the structure of the Railroad Adjustment Board is concerned, does not exist in fact. As a matter of fact, all of the carrier members of all four divisions are railroad men of the same general background. Such representatives are sometimes moved from one division of the board to another. At this moment one of the carrier members of the fourth division was formerly, for several years, a carrier member of the first division.

Contrary to the inference which might be drawn from page 4 of the brief, the controversy as to which division of the National Railroad Adjustment Board has jurisdiction of disputes involving railroad yardmasters did not originate in August, 1941, or even in March, 1938. From the time of the Adjustment Board's organization, this intervenor-respondent has insisted, to the Adjustment Board and the National Mediation Board, that the fourth and not the first division of the adjustment board has jurisdiction of such disputes. A dispute involving a yardmaster case was filed with the fourth division jointly by this respondent and Northern Pacific Railway Company on June 5, 1935 and concerned an action by the carrier on February 5, 1935. The first annual report of the National Mediation Board, which included the report of all four divisions of the National Railroad Adjustment Board, refers to this case as "awaiting action June 30, 1935"; and a year later it still remained undisposed of.[3]

The assertion (brief 4) that prior to August 28, 1941 the first division "assumed jurisdiction" of yardmaster dis-

[3]National Mediation Board, First Annual Report (year ended June 30, 1935), p. 58; Second Annual Report (1936), p. 46.

putes and rendered awards therein, is not sustained by the 19 awards which constitute plaintiff's exhibit K (R. 210). Typical is award 1,274 dated July 13, 1936. It involved yardmen or switchmen, not yardmasters, and could not by any stretch of the imagination be properly considered a dispute "involving yardmasters" as petitioners use that term (brief 4). The statement of claim in that case reads as follows:

> "The *irregular promotions of Yardmen*[1] to positions of regular and extra assistant yardmasters, and time claim of Yardman J. S. Ward, Jr., account the refusal by East Joliet terminal officials to promote him to position of regular assistant yardmaster on December 17th, 1933. Claiming the differential in rates as a yard helper and assistant yardmaster since December 19th, 1933, until promoted to this position."

The last paragraph of the findings is as follows:

> "Under Article 10 (c), it is not mandatory upon the carrier to appoint *senior yardmen* as assistant yardmasters, but *such yardmen* must in all cases be given full and unprejudiced consideration. From the evidence of record there appears to have been no violation of this article as thus construed."

Article 10 (c) thus referred to is, of course, part of the collective bargaining agreement covering *yardmen*.

Early in 1938 the petitioner organizations filed with the first division four disputes (docket Nos. 1198, 4503, 4504, 4505)[2] which on their face appeared to involve claims of four of their members as yardmasters. In January, 1938, the first division deadlocked on the question of jurisdiction and reported such deadlock to the interested parties. On

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[1] Italics are supplied throughout this brief, unless otherwise specified.

[2] Published Awards, First Division, National Railroad Adjustment Board, Vol. 15, pp. 341-360.

March 15, 1938 this intervenor-respondent filed with the fourth division three yardmaster disputes (R. 157). The fourth division also deadlocked on the question of assuming jurisdiction (R. 158).

This intervenor-respondent thereupon brought action in the district court against all members of the fourth division for a writ of mandamus or mandatory injunction to command that division to hear the three yardmaster cases. The object of the petition (R. 171) was to cut through what otherwise might have been an endless spiral of deadlocks and failures to act, with the decisions of the two divisions in possible conflict. The answer of the carrier members of the fourth division (R. 175) was precisely what their previous contention that the fourth division has jurisdiction of yardmaster cases had led everyone to expect. As to the employee members, their contention that the first and not the fourth division has jurisdiction of such cases, which had deadlocked the fourth division, led this intervenor-respondent and everyone else in the proceeding to expect that they would resist the petition. When instead of doing so they failed to answer, the record suggests and there in fact existed no cogent reason why default for want of answer and decree in accordance with the petition should not have been taken against them (R. 176). If by the recital which the petitioners take the trouble to italicize on page 5 of their brief, and to repeat at every possible opportunity, they intend to suggest that the decree was "collusive" in any sense other than that it was consented to by the answer of some of the defendants and based on the default of others, the suggestion is both unjustified and unjustifiable.

The assertion (brief 5) that the first division *continued* to assert jurisdiction over yardmaster disputes until August,

1941 is not correct and the trial court's finding (R. 230-1) that prior to August, 1941 the first division had heard disputes involving yardmasters and rendered awards in such disputes rather obviously does not sustain it. In the cases in which awards were rendered the inter-division jurisdictional question was never raised. In August, 1938, petitioner Order of Railroad Conductors and respondent Great Northern Railway Company joined in submitting to the fourth division a dispute involving two yardmasters. Later, however, the case was withdrawn and in October, 1938 the petitioner organization made an *ex parte* submission to the first division, where the matter is still pending (R. 158-9, 160). No award has been rendered, eight years later, because of the deadlock between the carrier and labor members of that division over the jurisdiction of disputes involving yardmasters (R. 160). Several other disputes involving yardmasters docketed in the first division are in the same situation (R. 160-1). Since the carrier members of the first division formally stated their objection to the consideration of yardmaster disputes in a letter to the employee members dated August 28, 1941 (R. 27), disputes involving yardmasters have not been considered by the first division (R. 161).

The petitioner organizations and their executive officers thereupon on January 12, 1942 began this litigation by filing in the district court their complaint in the nature of a petition for declaratory judgment (R. 2) against the members of the first division. Subsequently by amendment the members of the fourth division, respondents here, were made additional parties defendant (R. 144-6). It is by the contents of these petitioners' complaint that the scope of this litigation and their own rights in it must be tested. They allege (R. 3) that they bring the action in behalf of

their members and in behalf of all others similarly situated, whether members or not; and later (R. 4) that in October, 1938 and March, 1941, respectively, each of them had filed an alleged dispute in behalf of a yardmaster "otherwise known as a yard service employee" with the first division which that division on account of the jurisdictional controversy aforesaid has not heard or decided. Their complaint and supporting exhibits (R. 2-88) nevertheless will be searched in vain for anything to negative the inference that they proceeded then and proceed now, not for the benefit of their few hundred yardmaster members as such, but primarily in the interest of their quarter of a million train and yard service employee members.

The structure of the Railroad Adjustment Board, as prescribed in section 3 of the act, and the exhibits to the original complaint (R. 14-88) do make it clear that in instituting this proceeding petitioners had two objectives. The first was to have their claims in respect of yardmaster vacancies tried before a tribunal whose employee members are selected (as are those of the first division) by train and yard service representatives, *i. e.*, principally by themselves. (See appendix to their brief, p. 60.) The second was to create a legal situation in which the weight of numbers might be used to compel yardmasters to sel ct the petitioner organizations rather than this intervenor-respondent as collective bargaining representatives. In short, this litigation is another attempt of large and powerful organizations to eliminate smaller ones from competition, and monopolize the collective bargaining field.

It is true that yardmasters are employees within the meaning of section 1, fifth of the Act (brief 6); but only because they are among the subordinate officials expressly

included by that section. But the fact that they supervise yard service employees (brief 6 ff.) has no tendency to bring them within the scope of the first division's jurisdiction. Quite the contrary. The yardmaster is in charge of the yard and supervises *all* the employees therein. Disputes involving (for example) clerks are under the jurisdiction of the third division. Disputes involving car inspectors are under the jurisdiction of the second division. These and many similar examples but explain the need for a division with catch-all jurisdiction which led the Congress to create the fourth division.

The recital (brief 8-13) as to the effect of the decisions below is both incorrect and misleading. There is no basis for the statement that the district court in holding that yardmasters were not yard service employees relied "entirely" upon the oral testimony of the three railroad executives who admittedly testified to that effect, as against the one whose like testimony petitioners attempt to construe as testimony to the contrary (R. 190-221). Nothing whatever in or out of the record justifies the assertion that either court ignored the documentary evidence, or the stipulation of facts, to say nothing of any other legitimate aids to statutory construction to which petitioners may advert. The circuit court of appeals based its total conclusions specifically on a study of the record as such (R. 273); referred at length to the history of the act and its predecessor statutes and based its conclusion that the supposed "historical alignment" of yardmasters with the train and yard service crafts in settlement of disputes is not helpful, upon the facts so discussed.

Insofar as the terms "yard service" and "yard service employees" are technical terms in railroad usage, introduced into the Railway Labor Act as railroad terms having

the meanings customarily assigned to them in railroad parlance (findings 7-10; R. 232), which the petitioners must and apparently do concede, the trial court was fully justified in giving great importance to the testimony of experienced railroad officials and representatives of railroad employees (finding of fact 13, R. 233). The "historical" evidence, with or without the new matters which appear at pages 15-26, 37-47, of petitioners' brief here, leads to the same conclusion as the oral testimony. It is quite needless to add that the trial court's findings were based, specifically, upon consideration of documentary as well as oral evidence (R. 229).

The Question Presented.

The only question actually in issue is whether the first or the fourth division of the National Railroad Adjustment Board has jurisdiction over disputes involving yardmasters. That question in turn depends upon whether yardmasters are "train and yard service employees" within the meaning of section 3 first (h) of the Railway Labor Act. Hence, the only ultimate issue is the correctness of the district court's conclusions of law 2, 4 and 5 (R. 233-4). All other matters discussed in petitioners' brief are entirely collateral.

Summary of Argument.

1. What the Congress meant by section 3 first (h) is an ordinary question of statutory interpretation. In deciding it, the first resort of both courts below was to the language of the statute itself. To the extent it appeared that the term "yard-service employees" was one of special usage, the meaning of that term became a question of fact to be resolved like any similar question. The Congress must be taken to have intended to follow the usage of the trade from

which the term came, unless the contrary clearly appears. So tested, the conclusions of both trial and appellate courts as to the meaning of the term were correct. The correctness of their decisions as to the meaning of the statute follows inevitably.

2. Nothing in the legislative history of the 1934 amendments to the Railway Labor Act modifies the foregoing conclusion. Yardmasters have not been "aligned with train and yard service crafts" in the submission of their disputes to adjustment boards from the time of federal control of the railroads in 1918 to the amendments to the Railway Labor Act in 1934. Yardmasters have not been "historically grouped as transportation operating employees" and have not been "consistently recognized and referred to as employed in yard service." The first division of the National Railroad Adjustment Board was not patterned after, nor did it take over the work of, any previous board which had jurisdiction over or in fact heard and decided "disputes involving yardmasters."

3. Nothing in the administrative interpretation of the 1934 amendments to the Railway Labor Act or its predecessor statutes modifies the conclusion, from the statute itself and from its legislative history, that both district court and circuit court of appeals interpreted the statute correctly. The omission of senate committees to report out proposed amendments to the Railway Labor Act does not constitute a "subsequent legislative construction" of the act by the Congress.

ARGUMENT.

I.

As a matter of ordinary statutory interpretation, the judgments below are clearly correct.

When a federal court must construe an act of Congress its first resort is to the language used by the Congress. If necessary as aids, it may also resort to the legislative history of the statute; prior administrative interpretations; and subsequent legislative construction by the Congress itself. *Great Northern Railway Co.* v. *United States*, 315 U. S. 262, 277.

The meaning of the statute must in the first instance be sought in the words of the statute itself; and where those words are plain, the need for extrinsic aids cannot exist and recourse to extrinsic evidence of legislative intent is not permissible. The language being plain, "it is the sole evidence of the ultimate legislative intent." *Caminetti* v. *United States*, 242 U. S. 470, 490.

Where a statute incorporates a term of special usage, however, the court must first determine as a question of fact the sense in which the Congress used such term. Hence the trial court was quite correct in listening to the testimony of men skilled in the parlance from which the term "yard service employees" came. *O'Hara* v. *S. S. Co.*, 269 U. S. 364. It would have been correct (had that question arisen) in preferring their testimony to inferences drawn from legislative history and administrative background, unless those inferences were so clear as to indicate that the witnesses so skilled did not in reality know what they were talking about. The circuit court of appeals, reviewing findings of fact based on a record composed in part of such

testimony and in part of documents, was right in deciding that the trial court's findings of fact were amply sustained by the record and should not be overturned, both under F.R.C.P. 52 and under general rules of trial and appellate procedure.

The petitioners' brief (pp. 55-7) suggests, and the entire record (including matters within the scope of judicial notice) in fact discloses no reason why rule 52(a) does not apply to the trial court's finding as to the meaning of the term "yard service employees", especially insofar as the record presents any conflict. Neither *Bogardus* v. *Commissioner*, 302 U. S. 34, nor any other case cited at page 56 of the brief is to the contrary. Granting that the problem of construing section 3 first (h) is one in solving which the circuit court of appeals might have substituted its own answer for that of the district court, and this Court may substitute its own answer for both, that fact renders no less persuasive the findings in this record, as to the meaning in railroad parlance of the term "yard service employees" and as to the exclusion of yardmasters and assistant yardmasters from that meaning.

Petitioners, of course, are entirely in error in asserting (brief 11) that either trial or appellate court ignored the documentary evidence or that the documentary evidence contradicted the oral testimony. The stipulation executed by the present petitioners as well as by the other parties as to the nature of a railroad yard, the work done by yard service employees, and the supervisory functions of yardmasters (R. 162-9) is enough to indicate that the finding that yard service employees do not include yardmasters and assistant yardmasters must be sustained, even if all oral testimony were disregarded and attention directed to the documentary proof alone. The opinion of the circuit court of appeals and especially that part of it which ap-

pears at pp. 274-7 of the present record, is enough to indicate further that the petitioners' analysis (brief 29-33) of the processes by which the circuit court of appeals arrived at its decision is grossly inaccurate.

The decisions of this Court (brief 25-26) are not to the contrary, but sustain both lower courts. The instant case likewise resembles *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107-11, in which this Court held (reversing the circuit court of appeals and affirming the district court) that the term "sub-contractor" in section 2(a) of the Miller act does not include a material-man who merely sells materials to contractors. In so holding, this Court said that the policy of the act does not warrant disregard of the plain words of the act itself: "Specific terms prevail over the general term in the same or another statute which otherwise might be controlling" (*Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208); and that the practical considerations underlying the act, as well as the clear distinctions to be gathered from the reports of hearings before congressional committees, precluded any other construction.

Whatever may be a yardmaster's duties on any particular system, in the "yard" he is the supervisor of engineers, firemen, hostlers, and outside hostler helpers, conductors and trainmen. The reference in section 3 first (h) to these groups of employees, after the words "to have jurisdiction over disputes involving train and yard service employees" and the inclusion of yard-service employees therein, is a particularization which limits the more general language which precedes it. The very fact that these additional words were used indicates that the Congress did not intend to include even every employee in train and yard service. The words "yard-service employees" following the enumeration of certain classes of employees, does not include all employees in yard-service within the first divi-

sion's jurisdiction. If it did, it would be found that the first division has jurisdiction over employees included in the specific enumeration of employees over which divisions two and three likewise have jurisdiction.

Yardmasters are not included in the words "train- and yard-service employees," appearing before the enumeration of employees, because where a general description is followed with such words as "namely", "that is to say", or "as follows", and the items are then set out, the preceding general words are restrained and confined to the subsequent enumeration. *Bock* v. *Perkins*, 139 U. S. 628, 638, quoting from *Mims* v. *Armstrong*, 31 Maryland 87.

Yardmasters are not included in the classes of employees specifically enumerated because a yardmaster is not an engineer, or a fireman, or a hostler, or an outside hostler helper, or a conductor, or a trainman.

Yardmasters are not included in the words "yard-service employees" which follow the above enumeration of classes of employees, under the familiar rules of statutory construction, *noscitur a sociis* and *ejusdem generis*. The former is of course, that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. *Texas & No. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 568. The latter is that general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general. *U. S.* v. *Baumgartner*, 259 Fed. 722, 724.

These rules have been applied to similar questions of statutory interpretation in the following typical cases:

Pulom v. *Jacob Dold Packing Co.*, 182 Fed. 356, 359.

Buckland v. *Lee*, 6 Fed. Supp. 606, 608.

United States v. *Florida East Coast Ry. Co.*, 222 Fed. 33.

Morecock v. *Hood*, 162 S. E. 730, 202 N. C. 321.

Brooks v. *Cook*, 44 Mich. 617, 7 N. W. 216.

Hodgson v. *Mountain & Gulf Oil Co.*, 297 Fed. 269, 272.

Ambler v. *Whipple*, 139 Ill. 311, 317.

The language in the act with respect to the fourth division likewise is plain and unambiguous. It is that the fourth division shall "have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which juisdiction is not given to the first, second and third divisions." The statute does not state "all other employees *of such* carriers" or "all other employees of carriers *engaged in the transportation* of passengers by water" but *all other* employees *"of carriers over which jurisdiction is not given to the first, second and third divisions."* The use of a comma after the word "water" is also significant and indicates that a different group of employees was contemplated by the last clause. Otherwise there would be no necessity for it and it would have been omitted.

The term "employee" as used in the act "includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission . . ." (section 1 fifth). The act was passed "to provide for the prompt disposition of disputes between carriers and their employees". The Congress, in the sub-sections dealing with the jurisdiction of divisions one, two and three, enumerated certain classes

of employees. It obviously did not, and as a practical matter could not, name all classes. It therefore included in the sub-section dealing with the fourth division, jurisdiction over "all other employees of carriers over which jurisdiction is not given to the first, second and third divisions." It is presumed that the legislature had a meaning for each provision and used no superfluous words. "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, Sec. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." ' " *Ex parte Public Bank*, 278 U. S. 101.

II.

The legislative history of the 1934 amendments to the Railway Labor Act and of predecessor statutes insofar as relevant, sustains the decisions of both lower courts.

Yardmasters and "disputes involving yardmasters" are within the purview of section 3 first (h) of the railway labor act; but only because yardmasters are "subordinate officials", and thus within the definition of the term "employee" set out in section 1 fifth of the statute. Much of the argument as to action taken under federal control during World War I (petitioners' brief, 15-19) is wholly irrelevant, if for no other reason than that yardmasters as a class were not, when federal control began on December 31, 1917, definitely considered railroad "employees", from the collective bargaining and grievance-adjustment point of view. At that time they were sometimes referred to as officials, but more accurately speaking, were probably in some no-man's land between "officials" and "employees". The director gen-

eral of railroads, in general order No. 27 (petitioners' brief, 46) did not place them as a class under the supplements of that order, except for article II, section (a), which merely covered a percentage wage increase applicable to all railroad workers receiving up to $250 a month.[6]

Instead of including yardmasters within the various supplements of general order No. 27, the director general authorized certain rates of pay and working conditions for yardmasters retroactive to June 1, 1919, and the various regional directors were directed to place these authorizations in effect. The regional directors complied by issuing their own directives of which there are almost innumerable examples still in existence. For example, the regional director, northwestern region, issued one which begins as follows:

October 17, 1918.

"United States Railroad Administration
W. G. McAdoo, *Director General*
Washington, D. C.
Northwestern Region

To Northwestern Railroads:

Supplement No. 6 to Circular No. 28
Rates of Pay—Yardmasters

The Director General has authorized the following rates of pay and working conditions for yardmasters, effective at once and retroactive to June 1, 1918. This cancels all previous authorizations since the application of General Order No. 27:"

followed by specific directions as to minimum and maximum monthly pay rates, time off, vacations, etc.[7]

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[6]General Order No. 27 with supplements, addenda, amendments and interpretations issued by United States Railroad Administration, compiled by the National Railroad Adjustment Board, Dec. 1, 1935, pp. 11-14.

[7]United States Railroad Administration Records, National Archives, Washington, D. C.

Supplement No. 22[8] to general order No. 27 (petitioners' brief 46-7) was no exception. "Footboard yardmasters" are not yardmasters at all. They are yard or engine foremen or yard conductors who are paid compensation (usually five cents an hour) above the regular foreman's or conductor's rate for supervising their own crews. They always have been treated uniformly as belonging to a different class or craft, governed by the same agreements as yard foremen, yard conductors and yard brakemen.[9] Supplement No. 22 had no reference to yardmasters as a class; to the contrary, it governed engine foremen as a class.

On the other hand, United States Railroad Administration Supplements Nos. 15, 16, 23, 24, 25[10] and interpretations and addenda thereto covered "yard-service employees." Supplement No. 15 includes "YARD SERVICE ARTICLE XII—RATES OF PAY, Engineers, Firemen, Helpers." Supplement No. 16 includes "YARD SERVICE ARTICLE XI—RATES OF PAY, Foremen, Helpers, Switchtenders." The same ratings were made in supplements Nos. 24 and 25 and their interpretations and addenda.

If the United States Railroad Administration had regarded yardmasters as yard service employees, yardmasters as a class would have been listed in the supplements just referred to.

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[8]General Order No. 27 with supplements, addenda, amendments and interpretations issued by United States Railroad Administration, compiled by the National Railroad Adjustment Board, Dec. 1, 1935, p. 159.

[9]Rules for Reporting Information on Railroad Employees, together with a classification and index of steam railroad occupations, Railroad Labor Board, Chicago, Ill., May, 1921, pp. 249, 255-7, 320.

[10]General Order No. 27 with supplements, addenda, amendments and interpretations issued by United States Railroad Administration, compiled by the National Railroad Adjustment Board, Dec. 1, 1935, pp. 121, 129, 333, 335, 375.

These classifications were not made by inexperienced men. The director of the division of labor during federal control was W. S. Carter, then president of the Brotherhood of Locomotive Firemen and Engineers. The director of the division of operation was W. T. Tyler, an experienced railroad operating official. Both of them had the assistance of many experienced officials, drawn from among both railroad labor and operating executives.

The Transportation Act of 1920 discontinued federal control. Title III provided *inter alia* for the formation of the United States Railroad Labor Board. In that act the term "subordinate official" as applied to railway employees (again see section 1 fifth of the present statute) appears in formal nomenclature for the first time. Section 300(5) of title III is in part as follows:

> "The term 'subordinate official' includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations."

Pursuant to this direction the Interstate Commerce Commission held hearings March 15, 1920 and on March 23, 1920, or 23 days after the end of federal control, issued its ex parte 72 (subsequently amended November 1, 1920 and February 5, 1924; intervenor's exhibit 5, R. 201-2) being regulations "designating the class of employees to be included under the term 'subordinate official' under the transportation act of 1920." These regulations included in the subordinate official class (and simultaneously designated as railroad employees) yardmasters and assistant yardmasters, train dispatchers and other subordinate officils "excepting general yardmasters at large and impor-

tant switching centers where of necessity such general yardmasters are vested with the responsibility and authority that stamp them as officials."

This was the first time and occasion when yardmasters of any grade were designated as other than "officials" and allowed the same benefits and protection as other "employees" under the transportation act of 1920. It was also the first time and occasion when yardmasters as a class were definitely and unequivocally classified as "railroad employees." This language of section 300(5) of title III of the 1920 act, and this action of the Interstate Commerce Commission thereunder, are clear evidence that, as already demonstrated, railroad yardmasters were not included in the supplements to general order No. 27 of the United States Railroad Administration because they were not in the category of railroad employees during the period of federal control. It is significant that on the same date (March 23, 1920) as ex parte 72 the Interstate Commerce Commission issued "supplemental regulations governing the making and offering of nominecs for the appointment of members for the railroad labor board." Original regulation 1, March 8, 1920, provided for the grouping of employees in three groups for that purpose. The supplemental regulations of March 23, 1920 provided for a fourth group included in which was Railroad Yardmasters of America, this intervenor-respondent."

The United States Railroad Labor Board was organized shortly afterward. On July 20, 1920 it issued its decision No. 2 which increased the rates of pay of all railroad employees.[11] That decision was, therefore, the first govern-

[11]Decisions of United States Railroad Labor Board, Vol. I, pp. 116, 118.

[12]Decisions of United States Railroad Labor Board, Vol. I, pp. 18, 27.

mental order dealing with yardmasters in the definite classification of railroad employees, which ex parte 72, issued in conformity with section 300(5), title III of the act had just accomplished. In that decision the Railroad Labor Board followed the same alignment of employees as had the United States Railroad Administration. Article VI referred to engine service employees, and in Section 3, under the sub-heading, "Yard Service," it listed engineers, firemen, helpers. Article VII dealt with train service employees and in Section 4, under the sub-heading, "Yard Service," listed foremen, helpers, switch tenders.

Yardmasters and assistant yardmasters, however, were listed as follows:

> "ARTICLE XI—OTHER SUPERVISORY FORCES.
>
> Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter-named classes, the following amounts per hour:
>
> | | | Cents. |
> |---|---|---|
> | Sec. 1. | Train dispatchers | 13 |
> | Sec. 2. | Yardmasters and assistant yardmasters | 15" |

The Labor Board followed the same alignment in its decision No. 147,[13] decreasing rates of pay of railroad employees, including subordinate officials.

In the proceedings resulting in that Board's decision No. 119 dated April 14, 1921, yardmasters as a class and through a labor organization of their own (this intervenor-respondent) were for the first time parties to a decision affecting their rights in respect of rules, working condi-

[13]Decisions of the United States Railroad Labor Board, Vol. II, pp. 133, 158.

tions and collective bargaining agreements.[14] "Yard service employees" through the organizations to which they belonged, including both of the present petitioners, were exempted from operation of decision No. 119. As to yardmasters, however, the Labor Board on October 13, 1922, in accordance with the provisions of decision No. 119 and addenda and in a controversy initiated by this intervenor-respondent, issued its decision No. 1266,[15] which for the first time established standard rules governing working conditions of yardmasters as a class. The net result was that the Labor Board, while leaving the existing standard rules for yard service employees unchanged, *established* for the first time standard rules governing working conditions of yardmasters. In that decision the Board in defining the scope of the rules referred specifically to the definition of the term "subordinate official" as set out in section 300(5) of the Transportation Act of 1920; and to the classification as such subordinate officials of yardmasters and assistant yardmasters, as quoted above from ex parte 72 (supplement of November 24, 1920); and stated that "in its consideration of article I defining the scope of the rules for yardmasters the United States Railroad Labor Board has recognized the above regulation". Article I under the heading "Scope" says that "the term 'yardmaster' as herein used shall be understood to include general yardmaster, assistant general yardmaster, yardmaster, assistant yardmaster, except general yardmasters referred to in ex parte No. 72, Interstate Commerce Commission".

In the five "wage series reports" of the same United

[14]Decisions of the United States Railroad Labor Board, Vol. II, p. 87. The intervention of Railroad Yardmasters of America is noted in the same volume, p. 535.

[15]Decisions of the United States Railroad Labor Board, Vol. III, p. 765.

States Railroad Labor Board yardmasters were classified under "Group I—supervisory forces",[16] whereas "yard service employees" are dealt with under group 7—train service employees. Report No. 1, p. 6, under the heading, "Basis of Computation," recites that "groupings have been made in accordance with the manner in which presentations have been made to the United States Railroad Labor Board by the respective organizations" and that "the basic information for the classes of employees as shown in this group was predicated upon the reports of the Interstate Commerce Commission • • • ."

In the statement attached to report 1 "yard service employees" are shown as "yard foremen, yard helpers, switchtenders." Such listing was carried in the same manner throughout four of the five reports. Report No. 2 is the "Rules for reporting information on railroad employees" which are referred to in petitioners' brief, pp. 41, 49, 50, and were later adopted by the Interstate Commerce Commission. At page 320 of that report, in the alphabetical list of payroll and distinctive class titles, "yard foremen" and "yard helper" are listed and following each designation the words "yard service" are in parentheses. The yardmaster listing on the same page does not include those words or any equivalent thereof.

At page 235 of Report No. 2, the heading is "Supervisory skilled trades and labor service" and "Yard Master Group" is listed thereunder with the symbol SYM. The definition for this group is: "This group includes positions in which the preponderant duties of incumbents are to supervise or to assist in supervising the work of em-

[16]United States Railroad Labor Board Wage Series Reports Nos. 14 inclusive, "Average Daily Wage Rates of Railroad Employees on Class I carriers", files of National Mediation Board, Washington, D. C. Report No. 1 is dated August, 1920; Report No. 5, April, 1926.

ployees engaged on the making up, breaking up and movement of trains within a yard." Nothing therein identifies them with "yard service employees."

Under "Train and engine service", commencing at page 255 of Report No. 2, there are listed "Yard conductors and yard foreman group" with the symbol TYC. This list does not include yardmasters.

It is apparent, then, that prior to federal control, during federal control and under the Transportation Act of 1920 there was no evidence either in the statutes and regulations or in actual railroad practice to support the contention that yardmasters are "yard service employees". To the contrary, during and prior to federal control they were generally regarded as officials—not railroad employees at all—or in a category somewhere between employees and officials. As a result of the practical necessity, recognized by the director general of railroads, for fixing their rates of pay and working conditions during the war period, they became definitely classified as subordinate officials, which classification was adopted by the Interstate Commerce Commission under the authority of section 300(5) of the 1920 act and is incorporated by reference in the definition section (section 1 fifth) of the present statute. The United States Railroad Labor Board likewise classified them as "supervisory forces" or "subordinate officials", in a class by themselves, by terms and context excluding them from classification with the yard service employees whom they had the duty to supervise. In short, the regulations and findings of the United States Railroad Administration, the Interstate Commerce Commission and the United States Railroad Labor Board down to the adoption of the Railway Labor Act of 1926 were and

are a consistent denial of the basic contention which the petitioners now make.

The same conclusion follows from a scrutiny of the development, from the period of federal control to 1926, of the machinery of adjustment of disputes of the character committed to the Railroad Adjustment Board by the 1934 statute. We do not find in the petitioner's brief any criticism of the recital, in the opinion of the circuit court of appeals (R. 274-6), of the order of events affecting such adjustments during that period. Petitioners criticise both of the courts below for their interpretation of the facts, but the factual recital itself is not assailed.

As there stated, under federal control three boards of adjustment were set up on a strictly organizational basis. No provision was made for submission to those boards of disputes of employees who did not belong to one of the organizations named in the agreement creating the board. The disputes of such employees were handled by the director of the division of labor of the United States Railroad Administration under circular No. 3. Thus disputes "involving yardmasters" were referable to not less than three separate adjustment bodies, if a yardmaster belonged to one of the organizations which were parties to the agreement creating them; but if he belonged to an organization not represented on one of these three boards or to no organization, he went to a special staff. Jurisdiction to hear and decide disputes during this period—those of yardmasters, yard-service employees, and all other employees—depended not upon a classification according to crafts or jobs, as it does now, but upon organizational representation.

Similarly the adjustment boards authorized to be cre-

ated by agreement *between organizations and carriers* under the transportation act of 1920 likewise had a jurisdiction referable to organization membership and not to a classification according to crafts or jobs.

The same thing was true of the regional and train service boards of adjustment created—again by agreement between organizations and carriers—under the railway labor act of 1926. Whatever these boards may or may not have done between 1926 and 1934, the petitioners can and do point to no "yardmaster dispute" heard by any regional train service board in which the jurisdiction of such board was referable to any occupational classification of yardmasters. They can and do refer to no dispute so decided on any jurisdictional basis other than the fact that the employee in whose behalf the dispute was submitted happened to be a member of the organization submitting it—which also was (because under the act it had to be) a party to the organization-carrier agreement creating such adjustment board.

It was against this historical background that the Congress considered and enacted the amendments of June 21, 1934 to the railway labor act. Two things are immediately apparent from scrutiny of the act itself and a reading of the evidence submitted to the committees of the Congress prior to its enactment: First, the Congressional object was to make adjustment compulsory, before an employer-employee tribunal whose four divisions in aggregate should have jurisdiction of all disputes, and with appropriate means of ending deadlocks; as contrasted with adjustment on a purely voluntary basis with neither tribunal nor jurisdiction except such as might be created or conferred by agreement between carriers and organizations of employees. Second, the structure and organization of the

several divisions of the board (including employee representation thereon), and their jurisdiction, were to be on a craft or job and not upon an organization membership basis. That individual rights before the adjustment board are independent of organization membership was emphasized by this Court in *Elgin, Joliet & Eastern Railway* v. *Burley*, 325 U. S. 711, 66 Sup. Ct. 721.

We find nothing whatever, in the sources cited in petitioners' brief, indicating a Congressional intent to classify as "yard service employees" yardmasters whom theretofore the Director General of Railroads, the Interstate Commerce Commission and the United States Railroad Labor Board had put into an entirely different classification. The record of hearings before both House and Senate Committees contains strong evidence to the contrary. So far as we can determine after careful scrutiny, yardmasters were not mentioned by name even once. Yard service employees, and *all of the special categories* included within that more general classification, are mentioned over and over again. Yardmasters are nowhere mentioned in any of these categories. They are mentioned only as part of the miscellaneous group—"all other employees of carriers over which jurisdiction is not given to the first, second and third divisions" over which jurisdiction was conferred upon the fourth division by the final form of section 3 first (h) of the act.

The principal statement in support of the amendments was made by George M. Harrison, who spoke for 21 standard railway labor organizations, including both of the present petitioners—but not this intervenor-respondent or any other organization representing yardmasters. The only specific references, anywhere in the hearings, to the classes of employees whose cases were to be heard by the

various divisions of the adjustment board, are found in his statements to the committee. In the hearings before the house committee, said:

> "The law then proposed that the board for the purpose of carrying on its work shall be divided into four divisions. Division 1 shall have jurisdiction over controversies affecting the train, engine and yard service employees. That is, the switchmen and the engineers and the firemen and conductors, and the trainmen and other related train service employees.
>
> "Division No. 2 shall have jurisdiction over controversies involving the mechanical drafts who are engaged in the repair of the cars and locomotives, commonly referred to as machinists, the boilermakers, blacksmiths, sheet metal workers, electricians, carpenters, and other related crafts.
>
> "Division 3 should have jurisdiction over the grievances of the miscellaneous employees: the clerks, maintenance-of-way men, signal men, telegraphers, train dispatchers, Pullman-car employees, express employees, dining-car employees, and generally the miscellaneous group."

The "miscellaneous group" was and is "all other employees of carriers over which jurisdiction is not given to the first, second and third divisions" of the present section 3 first (h) of the act. The witness referred to them as assigned to the third division because H.R. 7605 (the original House bill) so provided in identical language. H.R. 9689 (the counterpart of S. 3266) put "the miscellaneous group" under division 4, where they remained when the act of June 21, 1934 finally was adopted.

Again, at p. 93, he said:

> "Now, going back to Division 1, there are 5 classes of employees and 5 representatives. That is a big class of employees on American railways. It is the *train- and engine-service employees,* so they made

group 2 uniform with that, and group 3 uniform; and group 4, being a small class, put on only three."[17]

Mr. Harrison was followed by Mr. J. A. Farquharson, national legislative representative of the Brotherhood of Railroad Trainmen, in defense of amendments offered by the organizations to section 2 third, fourth and fifth. No amendment affecting the *classes of employees* whose cases were to be heard by the various divisions of the adjustment board was offered either before the committees or on the floor of either house of the Congress.

At the same hearing Mr. Joseph B. Eastman, then federal co-ordinator of transportation, at page 47 said:[18]

> "As constituted, the national adjustment board is in reality to be four separate boards, because it is to be divided into four separate sections which are to act independently with reference to separate *classes* of employees."

The statement is meaningless unless it refers to the separate classes of employees previously established under federal control and under the Transportation Act of 1920—ex parte 72 and its addenda being to this day the guide to all such classifications.

During the same hearings the carriers submitted a proposal for amendment of section 3 providing for four regional boards, each of which, however, was to be divided into groups "corresponding, insofar as practicable, with the scope of agreements in effect upon carriers parties thereto." The first group in each regional board was to be

[17]Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Congress, on H. R. 7650, pp. 82, 93.

[18]Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 73rd Congress, on H. R. 7650, p. 47.

as follows: "First group—train and yard service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, train and yard men."

The proponent of this amendment (which died in committee) was the same Mr. M. W. Clement whose testimony is referred to in petitioners' brief, p. 16. It is thus apparent that management and employees had the same thing in mind, *i. e.*, that employees, designated by the organizations as "train and engine service employees" and by management as "train and yard service employees," should take their disputes to the first division of the adjustment board; and that all other groups or classes not specifically taken care of in the first three divisions (including yardmasters) should be included within the catch-all jurisdiction of the fourth division. That is, "yard service employees" meant the same thing to the witness Harrison as it did to the witness Clement. No one in or out of this litigation has ever referred to yardmasters as "train service employees"—the term used by the present petitioners' legislative representatives in presenting the matter to both House and Senate committees. It may be noted in passing that on the Pennsylvania Railroad of which the witness Clement was an executive the yardmasters had no collective bargaining representation until this intervenor-respondent was certified by the National Mediation Board in late 1939 as their representative for the purposes of the Railway Labor Act; and the first yardmasters' collective bargaining agreement on that railroad was negotiated by this intervenor-respondent, effective February 1, 1940. It is certain that on that railroad yardmasters were never considered as either yard-service or train-service employees.

The assertion of the first division of the Adjustment

Board, that it "took over the work of the four regional boards" (brief 24) can hardly determine the Congressional intent. Notwithstanding the statement on p. 23 of the brief, it is useless to say that the first division "had no difficulty" in determining its jurisdiction of train and yard service employees, "including yardmasters" in view of the fact that from the very inception the question which division of the board had jurisdiction over yardmaster cases was in sharp controversy. No Chinese wall separated the fourth from the first division; the four divisions of the board constitute one entity; and neither carrier nor labor members of the first division could have been ignorant of the contentions which this intervenor-respondent was making before the fourth division or of the deadlock in the latter unit; any more than the fourth division can be assumed to have known nothing of the similar controversies and deadlocks which developed shortly afterward in the first division itself. After all, the National Mediation Board as early as June 24, 1936 took cognizance of the controversy, though deeming itself without the right or authority to pass on questions of jurisdiction.[19]

For it to have assumed that as the successor to the four regional boards the first division took over the work of hearing cases "involving yardmasters" would have been to ignore the fact that those boards had never had any right or power to hear disputes involving yardmasters *qua* yardmasters but only disputes affecting members of organizations who were parties to the agreements creating such boards, such membership rather than yardmasters'

[19]Letter, James W. Carmalt, Member National Mediation Board, to D. W. Helt, Chairman, National Railroad Adjustment Board, June 24, 1936, Inquiry of the Attorney General's Committee, Jones Compilation, Book I, pp. 414, 415.

status being the key to jurisdiction. (Opinion of the circuit court of appeals (R. 276).)

It is not even correct to say that the disputes of "yard service employees" represented by the Switchmen's Union of North America were heard by the regional boards, because that organization was not a party to the agreements establishing them; even though that organization, like this intervenor-respondent and the American Train Dispatchers Association and other organizations, may have had disputes which they handled for the employees whom they represented. In this connection it is interesting to note that the first annual report of the Mediation Board recites:

> "At the time the National Railroad Adjustment Board was created by law, there were in existence *some 300 regional and system boards of adjustment* set up by voluntary agreement of carriers and employes' organizations for the purpose of interpreting and applying agreements."[20]

It is not even claimed by petitioners that *any* of the approximately 1,200 cases inherited by the first division from the four regional boards involved yardmasters.

To say (brief 25) that if the Congress had intended to exclude yardmaster disputes from the jurisdiction of the first division it must have said so specifically, is to argue that the language used in describing the jurisdiction of the fourth division over "the miscellaneous group" is wholly without meaning. Certainly the omission from the clauses relating to the first, second and third divisions of any mention of yardmasters, and the inclusion in the clause relating to the fourth division of language which by its terms in-

[20] National Mediation Board, First Annual Report (year ended June 30, 1935), p. 37.

cludes all employees not specifically mentioned in such preceding clauses, would call for a directly contrary inference. Railroad history discloses and the brief suggests no reason why yardmasters should now be treated as an exception to this settled rule of statutory construction.

A more likely reason why yardmasters were not specifically designated may be found in the fact that before 1934 the total number of yardmasters represented by labor organizations enjoying the benefits of collective bargaining agreements was but a small percentage of the whole. The first available figures are found in the second annual report of the National Mediation Board for the fiscal year ended June 30, 1936 in which the following record of yardmaster representation appears:[21]

Organization	Number of Class 1 Railroads	Mileage
Railroad Yardmasters of America	18	57,281
Brotherhood of Railroad Trainmen	4	3,121
Railroad Yardmasters of North America, Inc.	3	2,842
System Associations, Employe Committees, Inc.	19	50,082

It is hardly necessary to add that system associations and employee committees are other names for company unions. Eliminating them—and for this purpose they should be eliminated—there were only 25 railroads, with a total mileage of approximately 63,000, in which yardmasters were represented by standard labor organizations.

When the above record is contrasted with the similar record, in the same report, of representation of other em-

[21] National Mediation Board, Second Annual Report (year ended June 30, 1936), p. 24.

ployees, this reason for the absence of specific designation or description of yardmasters becomes all the more apparent:

Organization	Number of Class 1 Railroads	Mileage
Brotherhood of Locomotive Engineers (locomotive engineers)	135	230,607
Brotherhood of Locomotive Firemen and Enginemen (locomotive firemen, hostlers and helpers)	130	230,392
Order of Railway Conductors conductors (road)	138	232,868
Brotherhood of Railroad Trainmen (brakemen, flagmen, baggage men (road))	141	234,113
Brotherhood of Railway and Steamship Clerks	98	208,480
Order of Railroad Telegraphers	123	216,810
American Train Dispatchers' Association	73	158,788

III.

The administrative interpretation of the act and of its predecessor statutes sustains the decisions of both district court and circuit court of appeals.

Against the historical background just outlined, the argument, beginning at page 26 of petitioners' brief, as to the "administrative interpretation" of section 3 first (h)—the very difference of opinion which brought this litigation about—fades into insignificance. The fact is that no attempt was made to submit cases involving yardmasters to any division of the adjustment board until 1935 and the first such attempt was made by this inter-

venor-respondent before the fourth division June 5, 1935. The first annual report of the first division of the adjustment board is the only divisional report in which cases were tabulated as to "subject matter". The reports of the other three divisions for that first year and the reports of all four divisions for later years include no such tabulations. The official index digest of the first division shows, as a matter of fact, four awards rendered that first year "involving yardmasters" as follows:[22]

Award 8 Claim of yardmen for day's pay at engine foreman's and helper's rates account general yardmaster and brakemen switching out bad order car, Grant Junction Yard. (*C&T* v. *D&RGW*)

Award 11 Claim of yardmen for day's pay engine foreman's and helper's rates account road crews switching in Grand Junction yard, yardmasters switching out bad order. (*C&T* v. *D&RGW*)

Award 152 Claim of two footboard yardmasters, Colorado Springs, for day at time and one-half at foremen's rate, instead of continuous time, for switching performed, after completion of regular assignments of eight hours (various dates) and helpers released. (*T* v. *AT&SF*)

Award 239 Claim of yardman for day account yardmaster assisted by hostler and helper, performing switching in Laredo yard. (*T* v. *IGN*)

Not a single one of these four cases involved a yardmaster's grievance.

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[22]Official Index Digest Awards Nos. 1-3800, First Division National Railroad Adjustment Board, Chicago, Ill., July 1, 1939, p. 820.

The National Mediation Board during the twelve years of its existence has reported the same general facts in several different ways at different times; and its grouping of employees for statistical purposes is to say the least weak evidence of the groups in which they belong for the purpose of handling grievances and adjusting disputes, or of the intent of the Congress with respect to the four divisions of the National Railroad Adjustment Board. Even so, if we look to the certifications as to authorized collective bargaining representatives and other reports and records of the board, we find that the National Mediation Board, acting under the provisions of section 2 ninth of the act, repeatedly and uniformly has determined yardmasters to be and treated them as a separate class or craft of employees.

The situation immediately following the establishment of the adjustment board, therefore, was not what pp. 35-6 of petitioners' brief would indicate. The question whether the first or fourth division of the adjustment board has jurisdiction over disputes involving yardmasters arose, not in 1938 or 1941 but at the very beginning. This intervenor-respondent first raised it as early as 1935. The "assumption of jurisdiction" by the first division simply did not take place and the agreement that yardmaster disputes were within its jurisdiction did not exist. This intervenor-respondent brought the matter into controversy at once. Neither this intervenor-respondent nor any other organization whose *primary interest* is the representation of yardmasters ever voluntarily invoked the jurisdiction of the first division in a yardmaster case. It will hardly be suggested that the inconsistent and confused situation in that division created an administrative precedent, binding on this intervenor-

respondent notwithstanding its early and continued protest, and binding on the federal courts notwithstanding the history of the act and the plain intent of the Congress.

Nor does administrative history before 1934 lend any aid to petitioners' argument. Under federal control boards of adjustment Nos. 1, 2 and 3 were set up for the primary purpose of dealing with disputes arising out of the application and interpretation of various supplements and interpretations of general order No. 27. Board No. 1 had to do with disputes involving train, engine and yardmen; board No. 2, with shop crafts; board No. 3 with clerks, telegraphers and other miscellaneous groups. The Switchmen's Union of North America which at that time had more collective bargaining agreements outstanding than at present, was placed under board No. 3. The disputes of yardmen, under agreements negotiated by the present petitioners, were naturally heard by board No. 1. The disputes of the same class of employees, however, if under agreements negotiated by the Switchmen's Union of North America, were heard by board No. 3.

Board No. 1 or Board No. 3 may have heard occasional cases involving the right of yardmen members of the organizations joining in the creation of the boards to promotion to yardmaster positions. But disputes involving *yardmasters as a class* were not heard by any of these boards of adjustment. The status of the yardmaster as a railroad employee (for purposes of collective bargaining and adjustment of grievances) remained anomalous until after the passage of the transportation act of 1920, title III of which created a new class of employees known as subordinate officials.

The regional boards established under section 302 of

title III of the 1920 act were voluntary in character. The two petitioner organizations, together with the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen were parties to the agreements which created them. Three of these agreements were continued in force under the 1926 Act. The southwest regional board was not created until 1928. Under those agreements the boards were required to hear only such grievances as were presented by the organizations who were parties to the agreements. Even the four organizations could not present to these boards the grievances of members employed by railroads which were not themselves parties to the agreements. Their jurisdiction, therefore, was not in either theory or practice of the universality which petitioners seek to suggest. As an interesting example of this fact, the Switchmen's Union of North America was not a party to any of these agreements; and where that union had made the collective bargaining agreement (even with a carrier which was a party to a given regional agreement) the disputes of employees covered by the Switchmen's Union agreement could not be adjusted before any of the regional boards.

Prior to June 21, 1934, therefore, there was in existence no tribunal for the hearing and adjustment of disputes between carriers and their employees whose authority, organization, structure, functions or jurisdiction had any correspondence with those of the present National Railroad Adjustment Board. The act of June 21, 1934 was a completely new departure in that field. It created a general and compulsory jurisdiction inclusive of all employer-employee disputes, including those involving yardmasters; as contrasted with a purely voluntary and limited jurisdiction, referable not to the statute but to carrier-organization agreements which (no yardmaster organization being a

party thereto) automatically excluded practically all genuine yardmaster cases.

In the light of these facts, it is difficult to see how the varying ways in which the National Mediation Board and other agencies which from time to time have had occasion to classify railroad employees for statistical reporting or other purposes (petitioners' brief 37-47) can bind the federal courts. In numerous reports, such as that for 1945, the Mediation Board has listed yardmasters as an entirely separate class.[23] The same reports show that where the petitioner organizations have in effect collective bargaining agreements covering yardmasters, they are always entirely separate from the agreements covering engine foremen, switchmen, switch tenders and other "yard service employees". Labor organizations other than those mentioned at page 45 of the brief include in their membership and represent crafts or classes other than the one of which their membership primarily consists. Pullman conductors, for example, go to the third division of the adjustment board even though the petitioner organizations represent them. The fourth division heard a dispute presented by one of petitioners involving a bus driver on a railroad having train and bus service. The fourth division hears disputes of train porters, although they are certainly train service employees.

The report of the 1943 emergency board was not directed to and can have no possible bearing upon, the question with which the district court and the circuit court of appeals were dealing in this case. Yardmasters were mentioned in that report because, and only because, these very petitioners brought their yardmaster members into the proceeding with them. Needless to say, the handling of yardmaster disputes by the National Railroad Adjustment Board was not even mentioned in the report.

[23] National Mediation Board, Eleventh Annual Report (fiscal year ended June 30, 1945), pp. 26, 51.

Naturally the Brotherhood of Railroad Trainmen, petitioner here, included in the information furnished by it to the Railroad Retirement Board for its operating manual for field officers the words "yardmasters and assistant yardmasters." Brief 45.

Decision No. 2948 as appears from the context (brief, 46) involved a dispute which under the 1934 act would properly be triable to the first division. It was not a dispute "involving yardmasters" at all. On the contrary, it involved the question of the right of the employees therein mentioned to exercise seniority *as yardmen* in which respect they are protected and governed by the agreement *covering yardmen.*

We do not believe the method used by the National Railroad Adjustment Board in indexing the awards of the first division (brief 41) is any indication of the Congressional intent.

The Congress has not "refused" to amend the statute. Nor did the senate committee on interstate commerce "reject" the proposed amendments. What it did was not to report them out. The opinion below (R. 278-9) completely disposed of this argument.

CONCLUSION.

Both of the decisions below clearly were correct unless there is to be gathered from section 3 first (h) of the Railway Labor Act a Congressional intention that the class or craft of supervisory employees known as yardmasters should and must be compelled to try their controversies with carriers before a tribunal whose employee members are selected by the very classes or crafts which in the course of their duties they must supervise. Unless made clear either by the clear language of the act or by some implication which in view of its history and purpose is inescapable, no such Congressional intention should be presumed. In holding that the Congress intended otherwise, both the district court and the circuit court of appeals were clearly right.

The decision of the circuit court of appeals was sound and just and should be affirmed.

Respectfully sumitted,

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November 25, 1946.

APPENDIX

Excerpts from Act of May 20, 1926, as amended by Act of June 21, 1934, 45 U.S.C., Sec. 151, *et seq.*

Section 1, Fifth, of the Railway Labor Act provides as follows:

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission."

Section 3, First (h) of the Railway Labor Act provides as follows:

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes

involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees."

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 64.—OCTOBER TERM, 1946.

The Order of Railway Conductors of America, H. W. Fraser, President, et al., Petitioners, 63 *v.* O. E. Swan, T. K. Faherty, R. A. Knoff, et al. F. J. Williams, William Bishop, Paul M. Carter, et al., Petitioners, 64 *v.* O. E. Swan, T. K. Faherty, R. A. Knoff, et al.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 13, 1947.]

MR. JUSTICE MURPHY delivered the opinion of the Court.

Our attention here is directed to a determination of which division of the National Railroad Adjustment Board has jurisdiction over disputes involving railroad yardmasters. The four divisions of the Board and their respective jurisdictions are established by § 3, First (h), of the Railway Labor Act, as amended in 1934.[1]

Each division of the Board is composed of an equal number of representatives of carriers and of national labor organizations. The statute authorizes the carriers and the national labor organizations to select their respective representatives and to designate the division on which each such representative shall serve. § 3, First (b) and (c). The jurisdiction of the divisions relates to disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay,

[1] 48 Stat. 1185, 1190–1191; 45 U. S. C. § 153, First (h).

rules, or working conditions." § 3, First (i). Disputes involving employees in certain specifically designated crafts are assigned to each division; the Fourth Division also has a "catch-all" jurisdiction over all disputes not assigned to one of the other three divisions. Appropriate provisions are made for hearings and for the entry of an award, to be followed by an order directed to the carrier if the award be in favor of the petitioner. In the event that the carrier fails to comply with the order, the petitioner or any person for whose benefit the order was made may seek enforcement of the order in a federal district court. § 3, First (p). In such suits, "the findings and order of the division of the Adjustment Board shall be prima face evidence of the facts therein stated." And the court is given power to take such action as may be appropriate to enforce or set aside the order. See *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 305.

Two of the national labor organizations are the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, petitioners herein. Their membership includes a small portion of the total number of railroad yardmasters in the country, approximately 20% of the total on the basis of the railroad mileage represented. Each of these organizations has one representative on the First Division and each contends that all yardmaster disputes must be heard solely by that division. But that contention is contradicted by the Railroad Yardmasters of America, a national labor organization composed almost entirely of yardmasters and claiming to represent more than 70% of all the yardmasters in the country. That organization, which is an intervenor-respondent herein, has failed to place a representative on any of the four divisions. Along with certain other organizations representing the small balance of yardmasters, it claims that yardmaster disputes lie within the exclusive juris-

diction of the Fourth Division. Various carriers with representatives on both the First and the Fourth Divisions join in that claim.

The result of this controversy is a stalemate so far as yardmaster disputes are concerned. The carrier and the labor members of the First Division are split evenly, the carrier members claiming that the division has no jurisdiction over these matters. The members of the Fourth Division are also evenly divided on the jurisdictional question, the labor members being of the view that yardmaster disputes are outside that division's jurisdiction. And since all the parties concede that neither the Second nor the Third Division has jurisdiction, no settlement of these disputes is possible under the present situation.[2]

The Order of Railway Conductors and the Brotherhood of Railroad Trainmen brought this action under 28 U. S. C. § 400 (1) to obtain a declaratory judgment to the effect that the First Division has sole jurisdiction over yardmaster disputes. Members of the First and Fourth Divisions were made parties defendant; and the Railroad Yardmasters of America, the Great Northern Railway Company and the Southern Pacific Company were allowed to intervene. The District Court, after a hearing, held

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[2] A decree was entered in the District Court in 1938 commanding the Fourth Division to hear and determine certain disputes involving yardmasters. That case arose on a petition for mandamus filed by the Railroad Yardmasters of America against the members of the Fourth Division. After issuance of summons, the members of the Fourth Division appeared and filed an answer stating that they were of the opinion that the Fourth Division did have jurisdiction. The decree was then entered with the consent of the parties to the action, but without argument and without the District Court being aware that a public question was involved and that other parties had an interest in the matter. The District Court and the Circuit Court of Appeals in the instant case held that this 1938 decree was not *res judicata* of the issue now presented in view of the circumstances under which it was entered.

that yardmaster disputes fall within the "catch-all" jurisdiction of the Fourth Division. The Circuit Court of Appeals agreed. 152 F. 2d 325. We granted certiorari because the issue raised is one of importance in the orderly administration of the Railway Labor Act. 328 U. S.—.

At the outstart it is important to note that judicial review of this matter is not precluded by the principles set forth in *Switchmen's Union v. National Mediation Board, supra,* and companion cases, *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323, and *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338. We are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny. We are dealing with a jurisdictional frustration on an administrative level, making impossible the issuance of administrative orders which Congress explicitly has opened to review by the courts. Until that basic jurisdictional controversy is settled, the procedure contemplated by § 3 of the Railway Labor Act remains a dead letter so far as yardmasters are concerned and the statutory rights of such persons become atrophied. A declaratory judgment action is therefore appropriate to remove such an administrative stagnation.

In other instances, we have left the problem of jurisdiction to be determined in the first instance by the administrative agency. *Myers* v. *Bethlehem Corp.*, 303 U. S. 41. But here both the First and the Fourth Divisions of the Board, due to the evenly-matched membership of railroad and labor representatives, appear hopelessly divided on the jurisdictional issue, making a determination impossible. Judicial guidance at this stage is justified as long as such a condition exists.

The issue is primarily one of statutory interpretation. The First Division is given jurisdiction over disputes "involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler

helpers, conductors, trainmen, and yard-service employees." The Fourth Division's jurisdiction extends to disputes "involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions." It is agreed that the only possible category under the First Division into which yardmasters might be placed is "yard-service employees." But if they cannot be so placed, they must necessarily fall into the "catch-all" jurisdiction of the Fourth Division. The problem thus is to determine what Congress meant when it used the term "yard-service employees."

There is no statutory definition of "yard-service employees." Nor is the term explained in any of the relevant legislative debates or reports; and it derives no meaning from the statutory policy or framework. Moreover, it is not in common or general usage outside of the railroad world. It is a technical term found only in railroad parlance. Evidence as to the meaning attached to it by those who are familiar with such parlance therefore becomes relevant in determining the meaning of the term as used by Congress. See *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 370–371.

The parties, all of whom are well acquainted with railroad terminology, stipulated certain facts. It was agreed that a railroad yard is a system of tracks within defined limits over which movements of engines and cars not authorized by timetable or train order may be made, subject to prescribed signals and rules or special instructions. It was further agreed that the "yard-service employees" or "yardmen" working in a yard perform such functions as switching, making and breaking up trains, moving and storing cars, inspecting cars and freight, repairing cars, maintaining equipment, sending and receiving messages, keeping records and making reports. As to yardmasters,

the stipulation stated: "All such yardmen and other employees performing work in a yard are directed and supervised in their work by a yardmaster, with the aid, if necessary, of one or more assistant yardmasters. Yardmasters do not and may not perform the work of yardmen and employees in train and engine service; they may perform some clerical work, if their entire time is not taken up with the direction and supervision of yardmen and other employees working in yards. . . . In general, yardmasters run the yards, of which they are in charge, and they are responsible for conditions within the same. Necessarily, they exercise a substantial measure of individual initiative and responsibility."

All of the witnesses who testified at the hearing agreed that yardmasters are functionally different from other employees working in yards due to their supervisory activities and responsibilities. The evidence also indicated that yardmasters have supervision over some who work within the yards but who are not spoken of as "yard-service employees," such as storekeepers, section men and clerks. On the crucial point, there was substantial agreement among the witnesses that yardmasters are not commonly designated in railroad parlance as "yard-service employees," that term being reserved for the yardmen described in the stipulation who work under the supervision of the yardmasters.[3]

[3] Petitioners' sole witness testified: "Yardmen are usually men who have to do with the making up and breaking up of trains, switching in the yard, and supervising the work of the yardmen, which would include, in my opinion, yardmasters and assistant yardmasters." But his opinion as to yardmasters in this respect was based upon his understanding of the law, not upon his own use or his knowledge of the use of the term "yard-service employees." He explained his belief that "every tribunal that has decided a dispute for men engaged in yard service, such as yard engineers, firemen, hostlers, hostler helpers, road conductors, trainmen and yardmen, have also decided cases for yardmasters and assistant yardmasters. Division 1, set up

The documentary evidence submitted by the parties tends to bear out this testimony. Thus numerous past awards made by the First and Fourth Divisions speak of yardmasters as distinct from yardmen or yard-service employees.[4] And the Interstate Commerce Commission, in making various classifications of railroad employees, recognizes a clear distinction between yardmasters and those over whom they have supervision.[5] And other documents introduced into the record and sources to which the parties have made reference either show the same distinction or are inconclusive on the matter.[6]

The District Court was therefore justified in finding as a fact that railroad usage has never included yardmasters

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under, by agreement, in 1918, the very first board in existence, did that. The Western Train Service Board, upon which I served, did that, as evidenced by Board decisions submitted here as an exhibit."

This witness also stated that yardmasters "fit more nearly in with the yard service employees than with any other class"—a recognition that yardmasters are different in fact from yard-service employees and that they do not fit precisely within that category.

[4] See National Railroad Adjustment Board, First Division, Award No. 1274 (July 13, 1936), Award No. 1464 (Oct. 7, 1936), Award No. 1603 (Dec. 14, 1936), Award No. 1648 (Jan. 21, 1937), Award No. 1728 (Feb. 11, 1937), Award No. 1896 (April 15, 1937), Award No. 2065 (July 16, 1937), Award No. 2364 (Nov. 12, 1937), Award No. 4466 (Jan. 15, 1940), Award No. 4548 (Feb. 8, 1940), Award No. 4584 (Feb. 20, 1940), Award No. 5816 (June 24, 1941), Award No. 7355 (Oct. 15, 1942); Fourth Division, Award No. 67 (July 25, 1940).

[5] See *Ex parte No. 72* (Nov. 24, 1920); *Ex parte No. 106*, Six-Hour Day Investigation, 190 I. C. C. 750. The forms and classification plan to be used in reporting wage and compensation data of steam railroad employees to the United States Railroad Labor Board and the Interstate Commerce Commission place yardmasters under "Supervisory Skilled Trades and Labor Service," while those performing yard-service work are placed under "Train and Engine Service."

[6] Thus the method used by the National Railroad Adjustment Board in indexing awards of the First Division does not provide any helpful guide as to the usage of "yard-service employees" in the railroad world.

and assistant yardmasters within the meaning of the terms "yard-service employees" or "yardmen." That court was also correct in concluding that the history of the adjustment of disputes prior to the amendment of the present statute in 1934 affords no assistance in resolving the problem confronting us. As pointed out more fully by the Circuit Court of Appeals, 152 F. 2d at 327–328, disputes involving yardmasters and disputes involving yard-service employees were previously submitted to various adjustment boards, which had been created by agreement, primarily on the basis of membership in signatory labor organizations. Jurisdiction was not then grounded, as it is now, on a craft or job classification irrespective of the labor organization representing the particular employees involved. Hence there was no occasion giving rise to a consistent and unequivocal administrative interpretation of the term "yard-service employees" to include yardmasters—an interpretation which, had it existed, might have shed some light on the adoption of the term by Congress in 1934.

Petitioners also urge that the jurisdiction of the First Division over yardmaster disputes is established by the settled administrative action of that division since its creation in 1934.[7] There is a serious question whether the jurisdictional issue now before us was fully considered by the division in many of the cases to which reference is made; certainly none of the awards did more than recite perfunctorily that the division had jurisdiction over the particular dispute. And none of the awards involved the Railroad Yardmasters of America, which has consistently objected to the assumption of jurisdiction by the First Division.[8] But aside from those factors, the present and prolonged administrative deadlock on the jurisdic-

[7] See cases cited in footnote 4, *supra*.

[8] See footnote 2, *supra*.

tional issue destroys whatever persuasive effect these prior adjudications by the First Division may have had. The administrative action has become anything but settled.

Finally, petitioners point out that Congress has failed to amend § 3, First (h), so as specifically to exclude "yardmasters and other subordinate officers" from the jurisdiction of the First Division, despite the introduction of two bills to that effect in the Senate in 1940 and 1941.[9] These bills were sent to an appropriate committee, but were never reported out. It does not appear whether the bills died because they were thought to be unnecessary or undesirable. No hearings were held; no committee reports were made. Under such circumstances, the failure of Congress to amend the statute is without meaning for purposes of statutory interpretation.

We accordingly agree with the two courts below that yardmasters are not "yard-service employees" within the jurisdiction of the First Division of the National Railroad Adjustment Board. Yardmaster disputes fall exclusively within the "catch-all" jurisdiction of the Fourth Division.

Affirmed.

[9] S. 4375, 76th Cong., 3d Sess.; S. 1660, 77th Cong., 1st Sess. Both bills were introduced by Senator Smith at the request of the American Short Line Railroad Association.

SUPREME COURT OF THE UNITED STATES

Nos. 63 AND 64.—OCTOBER TERM, 1946.

The Order of Railway Conductors of America, H. W. Fraser, President, et al., Petitioners, 63 *v.* O. E. Swan, T. K. Faherty, R. A. Knoff, et al. F. J. Williams, William Bishop, Paul M. Carter, et al., Petitioners, 64 *v.* O. E. Swan, T. K. Faherty, R. A. Knoff, et al.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 13, 1947.]

MR. JUSTICE FRANKFURTER.

After the fullest consideration this Court recently held in two cases that jurisdictional disputes between railroad unions subject to the Railway Labor Act are not within judicial competence. *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323. The decision in those cases derived from the fact that Congress "had not expressly authorized judicial review" and the history, the setting, and the implications of railway labor controversies counseled against inferring judicial review. Here we have a controversy between two divisions of the National Railroad Adjustment Board as to the disputes over which they respectively have jurisdiction. This controversy, however, entails consideration of technical problems in the railroad world and consequences in construing the distribution of authority among the divisions of the Adjustment Board for which judicial review seems no more appropriate than it did to settle jurisdictional conflicts between railroad brotherhoods.

Not finding any command in the statute for judicial review of this controversy, it seems to me, therefore, appropriate to leave it to the mediatory resources of the Railway Labor Act. If it be said that thus far deadlock has resulted, it does not follow that it will continue, if the Court keeps hands off. In any event, because mediatory machinery may not be effective is not a sufficient reason for judicial intervention, unless the direction of Congress is much more clear than I find it in the Railway Labor Act. This view is reinforced by the fact that the decision of the Court may be no more than an advisory opinion. My doubts have not commended themselves to the Court, but since I am not alone in entertaining them it seemed to me that they should be expressed.